Supreme Court, U.S.
FILED

97-34 JUL 1 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DIANE HICKS,

Petitioner,

v.

WESTINGHOUSE MATERIALS COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTIONS PRESENTED

1. Whether, in the event of a challenge to a peremptory strike under Batson v. Kentucky 476 U.S. 79, 106 S.Ct 1712 (1986), and in the light of the Court's holding in Purkett v. Elem, 115 S.Ct. 1769 (1995) concerning step two of Batson's three-step analysis, the trial judge must demonstrate, on the record, an understanding of his or her responsibilities under step three of the Batson analysis and must clearly demonstrate that he or she has fulfilled such responsibilities.

2. Whether a trial judge who, in the event of a challenge to a peremptory strike under Batson, shows, by articulating an incorrect interpretation of Batson on the record, that he clearly does not understand his responsibilities under step three of the Batson analysis, can nevertheless be held to have applied Batson properly.

3. Whether, in the event of a challenge to a peremptory strike under Batson, it is proper for the trial judge to consider the fact that the attorney exercising the peremptory strike made numerous misrepresentations to the trial judge and that the attorney did so not merely for the purpose of justifying the peremptory strike at issue, but also did so at another point during voir dire for the purpose of securing the "for cause" removal of another black juror.

4. Whether, given the important constitutional values inherent in Batson and its progeny, it is appropriate that appellate courts hold trial judges to a high standard in assessing whether or not particular trial judges have been faithful to their constitutionally significant responsibilities under Batson.

5. Whether certiorari should be granted, pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, when the decisions of both of the state appellate tribunals that have reviewed this case have departed from the standards enunciated by this Court in Batson and its progeny.

PARTIES TO THE PROCEEDINGS

The petitioner in this action is Diane Hicks. The respondents are NLO, Inc. *sub nom.* Westinghouse Materials Company, the Industrial Commission of Ohio, and the Ohio Bureau of Workers' Compensation.

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio in Case No. 95-2314 is reported at 78 Ohio St.3d 95 (1997) and is reproduced in Appendix A, p. A1. The opinion of the Court of Appeals for the First Appellate District, Hamilton County, Ohio in Case No. C-940094 is unreported and is reproduced in Appendix B, p. A16. The Decision on Motion for a New Trial, issued by the Common Pleas Court of Hamilton County, Ohio in Case No. A8910895 is unreported and is reproduced in Appendix C, p. A34.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 2, 1997. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves Amendment XIV to the Constitution of the United States and Ohio Revised Code § 2313.42, which are set forth in Appendices D and E, pp. A39 and A40, respectively.

STATEMENT OF THE CASE

Petitioner/plaintiff Diane Hicks sought workers' compensation benefits for the radiation-induced death of her husband, Larry Hicks. Larry Hicks' employer, defendant/respondent NLO, Inc., was a United States government contractor that operated the U.S. Department of Energy's Fernald uranium processing facility ("Fernald"). NLO contested the claim, as did defendant/respondent the Ohio Bureau of Workers' Compensation. After administrative denial of plaintiff's claim, a jury trial proceeded in the Common Pleas Court for Hamilton County, Ohio.

Before the jury was empaneled, plaintiff asked the trial judge to find that defendants' attorneys were using a peremptory

strike to remove an African American woman, Ms. Donna Adams, from the jury because of her race, in violation of Batson v. Kentucky 476 U.S. 79, 106 S.Ct 1712 (1986), and Edmonson v. Leesville Concrete Company, 111 S.Ct. 2077 (1991).[1] Plaintiff is also African American. Notwithstanding plaintiff's Batson challenge, Ms. Adams was excused. The jury empaneled ultimately rendered a 6-2 verdict against plaintiff, splitting along racial lines.[2]

Plaintiff appealed, citing discriminatory jury selection in violation of the Equal Protection Clause of the United States Constitution. The Court of Appeals for the First Appellate District, Hamilton County, Ohio affirmed, despite agreeing with plaintiff that the trial judge had "misunderstood" Batson. On appeal, the Supreme Court of Ohio also affirmed.

In this case, the relevant circumstances that demonstrate defense counsel's discriminatory use of a peremptory strike consist not only of the circumstances immediately surrounding defendants' removal of Juror Adams, but also many other indicia of discrimination during the entirety of voir dire. These other indicia include the double standard that defense counsel applied throughout voir dire to similarly situated African American and Caucasian venirepersons, and the numerous misstatements defense counsel made in order to secure the removal of black venirepersons.

A. OVERVIEW OF AFRICAN AMERICANS IN THE VENIRE DURING THE TWO DAYS OF VOIR DIRE

At the beginning of voir dire, there were a total of thirty-

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[1] Plaintiff's challenge was based on the fact that a single act of discriminatory jury selection, even if not outcome determinative, violates Equal Protection. Batson, 106 S.Ct. at 1722.

[2] The presence of two blacks on the eventual jury does not foreclose a finding of purposeful discrimination where even a single African American has been stricken for racial reasons. United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987)

four (34) venirepersons. Four of the eight venirepersons originally in the box were African Americans. These four were Jurors[3] Clark (#1), Hazely (#2), Elahee (#5), and Adams (#7). At that point, two other African Americans, Jurors Croft (#11) and Graham (#13), sat three and five seats away from the box, respectively. See App. F, p. A42.[4] There were no other African Americans among the thirty-four venirepersons. Id. So, of the first thirteen venire members, six were black; but after venireperson #13, all were white. Id.

At the end of the first day of voir dire, four of the eight persons in the box were African Americans -- Jurors Clark, Elahee, Adams, and Croft. The lone remaining African American venireperson, Juror Graham, was to be the next person seated in the box. Id.

Juror Clark failed to appear for the second day of voir dire. At the beginning of the second day of voir dire, even with Juror Clark's failure to appear, there were still four African Americans of the eight venirepersons in the box -- Jurors Elahee, Adams, Croft, and Graham. Id.

By the end of the second and last day of voir dire, following Juror Elahee's dismissal for cause at defendants' instigation and defendants' peremptory strike against Juror Adams, only two African American jurors remained -- Jurors Croft and Graham. Id. Jurors Croft and Graham were the only two jurors to side with plaintiff on the 6-2 verdict. Under the Ohio Rules of Civil Procedure, the concurrence of at least six of eight jurors is required before a civil verdict may be rendered. Rules 38 and 48.

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[3] Throughout this petition, the term "juror" is used as a shorthand for "prospective juror," just as the trial transcript does. Where we discuss the fact that a venireperson actually sat on the jury, we identify that individual as such.

[4] For the convenience of the Court, plaintiff has attached at App. F, page A42, a chart showing the configuration of black and white venirepersons at four stages during the two-day voir dire: the beginning and end of the first day, the beginning of the second day, and the end of voir dire. The chart was not part of the record before the trial court, but was included in plaintiff's briefs before the Supreme Court of Ohio as a visual aid.

B. DEFENSE COUNSEL'S EFFORTS TO REMOVE AFRICAN AMERICAN JURORS HAZELY AND ELAHEE

1. The Removal Of Juror Hazely

As voir dire began, the first venireperson in the box was Juror Clark, an African American. Neither side challenged Juror Clark for cause or peremptorily. Defendants focused first on the removal of the second juror in the box, Juror Hazely, also an African American. Ms. Hazely indicated that she "worked under the same department at University [of Cincinnati] Hospital" as plaintiff Diane Hicks. Defense counsel asked Ms. Hazely, "How long have you worked in the same area with Mrs. Hicks?" Ms. Hazely replied, "Well, we actually don't work in the same area. We work under the same department." After questioning Ms. Hazely, defendants approached the bench and requested that she be excused for cause. The trial court agreed, noting plaintiff's counsel's exception.

Juror Hazely's removal left three African Americans in the box. But it also brought the two other African Americans, Jurors Croft (#11) and Graham (#13), one seat closer to the box (i.e., two and four seats away, respectively).

2. The Removal Of Juror Elahee

After Juror Hazely's removal, the next African American to be questioned was Juror Elahee. Ms. Elahee revealed that "at some point . . . years ago," her brother had worked at Fernald, where plaintiff's decedent was employed at the time of his death. After questioning Ms. Elahee, both sides passed for cause.

Juror Clark failed to appear for the second day of voir dire, so Juror Graham, also an African American, moved into the box. This still left four black venirepersons (out of eight) in the box. Thus, at this point, defense counsel changed course and challenged Juror Elahee for cause, even though they had passed for cause after questioning her the previous day. They did so purportedly on the ground that Ms. Elahee's brother was "a member of the class" and

"a direct participant" in a then-pending class action filed against NLO in U.S. District Court on behalf of former Fernald employees. Defense counsel claimed that "[Ms. Elahee] could still be a direct beneficiary" under that lawsuit "as a first-line relative" of her brother, and that, as such, she would be "automatically" excluded from the jury in the instant case under Ohio Revised Code § 2313.42.[5] When pressed by the trial court for information about Ms. Elahee's brother, defense counsel admitted that "we were not able to determine that [Ms. Elahee's brother] was an employee" at Fernald. Thus, it could not be confirmed that Ms. Elahee's brother was ever a class member in the Fernald employees' class action, which was then pending against NLO. Although the trial court indicated that "[t]he connection is very, very remote," it nevertheless excused Ms. Elahee for cause.

3. Defense Counsel's Contrasting Conduct Toward Caucasians In The Venire Whose Circumstances Were Similar To Those Of African American Jurors Hazely And Elahee

While defense counsel instigated the removal of African American venirepersons Hazely and Elahee for cause, defense counsel displayed a lenient attitude toward similarly situated Caucasians in the venire.

a. White jurors who, like Juror Hazely, were familiar with persons involved in the case. During the first round of questioning, defendants neither questioned nor challenged for cause Juror Totlis, who is Caucasian. On the second day of voir dire, however, Mr. Totlis indicated that he knew defendants' controversial expert witness, Dr. Eugene Saenger; he served on a board of trustees with Dr. Saenger; he thought Dr. Saenger was an "[h]onorable gentleman with integrity, dedicated to his profession, active in the community" and a "nice guy"; and he could not say

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[5] In actuality, Ohio Revised Code § 2313.42 does not apply to sibling relationships.

for sure that his relationship with Dr. Saenger would not affect his assessment of Dr. Saenger's testimony. Defense counsel opposed excusing Juror Totlis based on his relationship with Dr. Saenger. The trial court refused to excuse Juror Totlis for cause, forcing plaintiff's counsel to use one of their peremptories to remove him. Defendants also opposed excusing white venireperson Winter, even though she knew defense counsel and was a friend of and attended Sunday School with his wife.

b. White jurors who, like Juror Elahee, were thought to have relatives with connections to Fernald. Juror Williams, who is white and was a sitting juror, is the sister of a class member in another class action against NLO involving the Fernald facility. Defense counsel passed for cause on Juror Williams. Defense counsel also passed for cause on another white venireperson, Juror Huber, whose husband had definitely worked at the Fernald facility during the same time that Juror Elahee's brother *might* have worked there.

C. DEFENDANTS' REMOVAL OF JUROR ADAMS

1. The Questioning Of Juror Adams

Juror Adams was questioned individually on the first day of voir dire. In the juror questionnaire she had completed, Ms. Adams indicated that she was a twenty-eight year old "homemaker," was married, and had four children. Under questioning by plaintiff's counsel, Ms. Adams stated that neither she nor a family member had ever worked at Fernald; that she was not familiar with NLO (Larry Hicks' employer), the Atomic Energy Commission, the Department of Energy (the owner of Fernald) or Fernald; that she did not remember any news about Fernald; and that she had no opinions about Fernald. Defendants' counsel then questioned Ms. Adams extensively. Ms. Adams stated that she had not read about Fernald in the newspaper; that she did not know about anything that occurred at Fernald; that she had no feelings about Fernald; that she did not know what materials Fernald handled; and that she did not know plaintiff or her late

husband. Defendants did not ask Ms. Adams about her education or employment history. Both sides passed for cause.

2. Defendants' Peremptory Strike Against Juror Adams

There were three African Americans remaining in the box -- Jurors Adams, Croft, and Graham -- when the trial court called upon the parties to exercise peremptory challenges toward the end of the second day of voir dire. As soon as defendants declared their intention to exercise a peremptory strike against Juror Adams, plaintiff's counsel asked to approach the bench. Allen P. Grunes, plaintiff's counsel, indicated that "we'd like to make a motion directed at peremptory challenges of black jurors by the defendants." As Mr. Grunes began to discuss Batson, the trial judge interrupted him, saying "I'm aware of that. But the only thing that I understand that it requires is an explanation on the record." Mr. Grunes asked for defense counsel's explanation on the record. The trial judge turned to defense counsel William Hawkins and said, "I think that's in order." Mr. Hawkins stated that (1) "Miss Adams is an unemployed woman," (2) she has "very limited educational background," (3) the case "involves some technical issues and medical testimony," and (4) "those issues require a certain level of education, a certain level of sophistication that may not be present in this particular juror."

Mr. Grunes challenged defense counsel's explanation, saying "[t]here's nothing that distinguishes her educational background or her employment status particularly from any other juror."[6] Louise M. Roselle, Mr. Grunes' co-counsel, then noted that Ms. Adams "has 11 years of schooling," that there were other jurors with less education than Ms. Adams, and that Ms. Adams' employment history was unknown. The trial court acknowledged "the questionnaires show that there are eight or ten or so

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[6] In the context of the peremptory strike against Juror Adams, Mr. Grunes also asked the trial judge to take into account defendants' treatment of black juror Elahee, whom defendants had challenged for cause on dubious grounds one day after they had passed for cause.

uneducated people out of the crowd . . . ." After further discussion, the court stated, "Well, we'll accept the statement as complying with the Federal Court rule and --" When defense counsel explained "it's not the Federal Court rule," the judge replied, "Whatever citation you've got there, the Supreme Court decision," whereupon Ms. Adams was excused.[7]

3. Defense Counsel's Contrasting Conduct Toward Caucasians In The Venire Whose Circumstances Were Similar To Those Of Juror Adams

While defense counsel exercised a peremptory strike against African American venireperson Adams, defense counsel displayed a lenient attitude toward similarly situated Caucasians in the venire.

a. White jurors whose level of education was comparable to that of Juror Adams. Four of the six eventual white jurors had no more than high school educations -- Jurors Chapman, Jordan, Hughes, and Berting. Defendants neither challenged these jurors for cause nor used peremptories to remove them. Nor did defendants challenge or strike Alternate Taphorn, also a Caucasian, who had less education (10th grade) than Juror Adams (11th grade). In fact, defendants objected when the trial court suggested that Juror Taphorn might be removed on the court's own motion. Moreover, defendants passed for cause on white venireperson Bishop, then opposed plaintiff's motion to excuse Ms. Bishop for cause. Ms. Bishop had only a ninth grade education.

b. White jurors who, like Juror Adams, were not employed at the time of trial. Defendants sought to remove Juror Adams ostensibly because she was "an unemployed woman" -- Ms. Adams is a homemaker. Defense counsel neither challenged for

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[7] Defense counsel also used a peremptory strike to remove prospective juror Balasubramaniam. Ms. Balasubramaniam was born in Sri Lanka, and was described by the trial judge as "swarthy of complexion." App. C, p. A35.

cause nor used peremptories to strike two white jurors -- Jurors Hughes and Wismer -- as well as white alternate Taphorn, none of whom was employed at the time of trial. Defendants also opposed plaintiff's motion to excuse white venireman Usher, who, like Ms. Adams, was also not employed at the time of trial.

c. Jurors' "levels of sophistication." Defendants' statements and conduct in seeking to remove Juror Adams due to a purported lack of "sophistication" contrasted with defense counsel's lenient attitude toward three Caucasian venirepersons who eventually became sitting jurors -- Jurors Chapman, Jordan, and Hughes. Juror Chapman was a 20-year old pizza delivery man, who provided answers similar to those supplied by Juror Adams -- e.g., he had heard something about Fernald, but did not remember what, and had no education past high school. Juror Jordan also had no education past high school and said she never watches the news or reads the newspaper. Juror Hughes had no education past high school and was not employed at the time of trial.

D. SEVEN RELEVANT MISSTATEMENTS BY DEFENSE COUNSEL DURING VOIR DIRE

Plaintiff contends that the trial judge in this case did not conduct a proper inquiry under step three of Batson and that, had the trial judge done so, he would have recognized no less than *seven* relevant statements by defense counsel that were either false or legally insupportable, which misstatements[8] were enough to undermine the believability of defense counsel's assertion that his peremptory strike against Juror Adams "ha[d] nothing to do with race." Defense counsel's seven misstatements can be summarized as follows:

(1) In pursuing removal of black venireperson Elahee ostensibly for cause, he stated as "fact that [Juror Elahee's brother] is a member of the class [in the Fernald employees' class action]."

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[8] Plaintiff cannot characterize these assertions as innocent misstatements because defendants have reiterated them throughout their subsequent briefs.

Shortly thereafter, the same attorney, who was also counsel for NLO in that class action, admitted that "we were not able to determine that he was an [NLO] employee"; nor could defendants produce any evidence that Ms. Elahee's brother was a subcontractor employee at Fernald.

(2) Regarding Ms. Elahee, defense counsel also told the trial judge that, "if you look at the statute which governs the ability to serve as a juror, a juror in Ohio, it lists the things that automatically exclude jurors." He was referring to Ohio Revised Code § 2313.42. Counsel had no legal basis for arguing that *automatic* exclusion under § 2313.42 was even possible with respect to Juror Elahee.

(3) Defense Counsel had no factual or legal basis for invoking § 2313.42(**H**), Ohio's only statutory provision that (in his words) "talks about the ability of jurors to serve; talks about those types of relationships and those who might have a stake in the outcome of related litigation."

(4) When a question was raised about Juror Taphorn's work history, plaintiff's counsel correctly pointed out that Juror Taphorn's completed juror questionnaire did not disclose her employment history. Defense Counsel nevertheless claimed that she gave her work history during voir dire, telling the trial court, "We asked her those questions." Defense counsel asked Ms. Taphorn no questions about her work history.

(5) Defense Counsel also indicated that *plaintiff's* counsel had asked Ms. Taphorn about her work history. Plaintiff's counsel did not ask Ms. Taphorn for a work history.

(6) To justify why he chose to use his peremptory strike on Mr. Adams in favor of Ms. Taphorn, and why the trial court should not remove Ms. Taphorn on its own motion, defense counsel cited numerous factors to show that Ms. Taphorn was "a totally different circumstance than [Ms.] Adams," including Ms. Taphorn's "work experience, her life experience, [and] . . . her work history . . . ." The record contains no information about Ms. Taphorn's "work experience," "life experience," or "work

history."[9]

(7) In further attempting to differentiate Juror Taphorn from Juror Adams, defense counsel also told the trial court that Ms. Adams had been excused because she had "[n]o work experience . . . ." Only moments earlier, he had told the trial court that Ms. Adams was being stricken because she "*is* an unemployed woman . . . ." (Emphasis added.)[10] In stating his Batson step two explanation, counsel did not assert that Ms. Adams was removed because she had *never* worked. Neither the parties nor the trial court had or elicited Ms. Adams' employment history. The juror questionnaire completed by Ms. Adams did not ask for her employment history.[11]

E. THE CONVERSATION BETWEEN DEFENSE COUNSEL OUTSIDE THE COURTROOM

Within a few minutes after the jury was empaneled, during a short recess, plaintiff overheard one of defendants' attorneys say to another outside the courtroom, "[W]ell, at least we don't have an all-black jury." NLO's attorney denied making the statement. The trial judge did not place the attorney under oath, but rather indicated that the statement was "not relevant" and proceeded with the trial.

F. DEFENSE COUNSEL'S REVISED EXPLANATIONS FOR STRIKING JUROR ADAMS AND THE TRIAL

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[9] Indeed, the Ohio Attorney General, one of the other defense counsel, admitted in her brief before the Supreme Court of Ohio that "[Ms. Taphorn] did not state her occupation before retirement."

[10] Defendants not only abandoned this original explanation for striking Ms. Adams, they later admitted to the state supreme court that this fact was of no significance.

[11] The Ohio Attorney General also acknowledged in her brief before the Supreme Court of Ohio that "there was no direct testimony by Ms. Adams concerning her employment status . . . ."

COURT'S DENIAL OF PLAINTIFF'S MOTION FOR A NEW TRIAL

Following the verdict, plaintiff moved for a new trial on grounds that, *inter alia*, defendants' use of a peremptory strike to remove Juror Adams violated Batson. In response, defense counsel disavowed or abandoned their earlier explanations for striking Juror Adams and offered completely new ones.

At the time they used a peremptory strike to remove Juror Adams, defense counsel offered the explanation that "Miss Adams is an unemployed woman." In their memorandum opposing plaintiff's motion for new trial, however, defense counsel disavowed this explanation, stating, "in fact, counsel explained that it was the fact that [Ms. Adams] had apparently never been employed that caused concern." It should be noted that the juror questionnaire completed by Ms. Adams did not ask her to supply an employment history, nor did she supply one on her own. During the entire voir dire, Ms. Adams was never asked about her employment history, nor did she volunteer information about it.

Also, in originally justifying their peremptory strike against Juror Adams, defense counsel explained that Ms. Adams "may" lack "a certain level of sophistication" that the "technical issues and medical testimony" in this case "require." But in their memorandum in opposition to plaintiff's motion for a new trial, defense counsel never mentioned Juror Adams' "level of sophistication." Instead, counsel stated in that memorandum:

> As the defense explained at the time, Ms. Adams had been observed throughout voir dire displaying a demeanor and appearance indicating boredom, disinterest, and inattention to the proceedings.

Nowhere in the trial transcript did defense counsel express the concern that Ms. Adams appeared bored, disinterested, or inattentive. The transcript does not contain any mention of her appearance, nor of defense counsel's impression of her appearance.

In denying plaintiff's motion for a new trial on Batson grounds, the trial court made passing reference to Ms. Adams'

"want of normal secondary education," but relied principally on one explanation that, by then, defendants appeared to have abandoned and on another explanation that defense counsel had not offered during the voir dire. The court stated that Ms. Adams was,

> in the Court's opinion, not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom.

App. C, p. A35 (Decision on Motion for a New Trial, p. 2). The trial court's decision also stated that

> [e]very effort was made to select a fair and impartial jury. Whatever may have been in the minds of counsel for either party, *the Court* was not indulging in an effort to impanel a racially imbalanced jury.

Id. (emphasis added).

G. THE COURT OF APPEALS' DECISION

The Court of Appeals for the First Appelllate District, Hamilton County, reviewed the record, App. B, p. A25, and concluded that the trial court "misunderstood the purpose of and the inferences permitted by the Batson line of cases." Id. Nevertheless, the court of appeals found that there were "valid, race-neutral reasons articulated to defend the use of peremptory challenges by the appellees . . . ."[12] Id. Accordingly, the court of appeals affirmed, holding that it could not "conclude that the trial court's decision to permit the challenges was clearly erroneous." Id. The

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[12] The court of appeals also noted plaintiff's "failure to make a timely objection to the challenge of prospective juror Balasubramaniam." App. B, p. A25. At oral argument before the court of appeals, however, plaintiff's counsel had acknowledged this fact and had indicated that the peremptory being challenged was that used to remove Juror Adams.

court of appeals described the jury's 6-2 verdict against plaintiff as a "harsh result," which, the court suggested, might well have been against the manifest weight of the evidence. Id. at pp. A19-A20.

H. THE DECISION OF THE SUPREME COURT OF OHIO

Plaintiff appealed the court of appeals' decision to the Supreme Court of Ohio, which affirmed in a decision dated April 2, 1997. 78 Ohio St.3d 95 (1997) (App. A, p. A1). In its decision, the court observed that "the relevant circumstances surrounding this proceeding appear largely devoid of any meaningful events that might have supported an inference of discriminatory purpose" and that defense counsel did not "make any statements during voir dire that were reflective of a discriminatory purpose." Id. at 100 (App. A, pp. A9-A10). The court found it was "simply not plausible that [defendants] employed a racial `double standard' during voir dire; rather, [defendants] sought to empanel a jury able to understand all aspects of a potentially complex case." Id. at 101 (App. A, pp. A12-A13).

In describing the trial court's performance of its responsibility under Batson "to determine if the [plaintiff] had established purposeful discrimination," id. (App. A, p. A13), the Supreme Court of Ohio used phrases like "imperfect in form" and "less than artful." Id. at 99, 102 (App. A, pp. A9 and A14). The state supreme court stated, however, "We do not sit as arbiters of eloquence," id. at 102 (App. A, p. A14), and thus held that "the trial court conducted a sufficient inquiry." Id. (App. A, p. A13). The court did not indicate which of the statements by the trial judge it found "less than artful" or in what way the trial court's inquiry was "imperfect in form."

The state supreme court also made clear its disagreement with the conclusion the state court of appeals had reached. The former noted initially that "[a] judge should make clear, on the record, that he or she understands and has applied the precise Batson test when racial discrimination has been alleged in opposition to a peremptory challenge." Id. at 99 (App. A, p. A9). The court then indicated, "Here, we conclude from a careful reading of the record that the

trial court understood and properly applied the Batson test." Id. The court added, "We therefore do not agree with the court of appeals that the trial court `misunderstood' Batson." Id. at 102 (App. A, p. A14). Nowhere in its opinion did the Supreme Court of Ohio quote or allude to the trial judge's statement "the only thing that I understand that it [Batson] requires is an explanation on the record."

REASONS WHY THE PETITION SHOULD BE GRANTED

This petition comes along at a time when the viability of Batson is being questioned as never before. It is hardly a secret that, when a party raises a challenge to a peremptory strike under Batson, the striking attorney often proffers a practiced or boilerplate explanation for the peremptory. Anyone who has read a fair number of cases involving Batson issues knows intuitively how these practiced and boilerplate explanations came to be part of the legal vernacular: they were proffered by striking attorneys in earlier cases and withstood judicial scrutiny. For example, one need only review the Batson jurisprudence to see that, once a court in a Batson case has upheld a particular explanation as "race-neutral" under step two of Batson, the explanation articulated becomes available for other attorneys to use in other Batson cases. It also becomes fodder for those who teach seminars designed to help attorneys avoid the pitfalls of Batson. One such seminar came to light in April of this year and is the main reason why the viability of Batson is being questioned now as never before.

In April, the nation witnessed the release of a videotape of a seminar that actually took place just months after this Court's decision in Batson. The instructor on the videotape is evidently heard advising the young prosecutors present to exclude blacks from juries *because they are black* and describing how he had resorted to lying in order to avoid a panel composed of what he

believed were too many African Americans.[13] This incident underscored the challenges that trial courts face in protecting the constitutional values inherent in Batson. In the aftermath of the incident, commentators have questioned anew whether or not trial judges can administer the Batson test and make good on the promise of Batson.[14] Is it that easy to circumvent Batson and exclude black jurors *because* of their race? How can a trial judge be expected to discern that an attorney is using peremptories to remove blacks from a venire? The gist of these questions is simply this: is Batson still viable? Or, perhaps more precisely, is the three-step test set forth in Batson still viable?

The Court partially answered this question two terms ago in Purkett v. Elem, 115 S.Ct. 1769 (1995). The instant case poses the part of the viability question that the Court could not fully address in Purkett. In Purkett, the Court evinced so much confidence in the viability of the Batson's three-step analysis that the Court held that any "race-neutral" explanation for a peremptory satisfies step two of the Batson analysis, no matter how "implausible or fantastic," "silly or superstitious" the explanation might be. Purkett, 115 S.Ct. at 1771. The Court was careful to note in Purkett, however, that step two of Batson was at issue there. Purkett clearly differentiated the trial court's role under step two from its distinct role under step three. Id. Purkett suggests the Court was confident that, even with the Court's holding as to step two, Batson's three-step analysis would remain viable because trial judges would be faithful to their responsibilities under step three of the analysis. Purkett, 115 S.Ct. at 1771. As this Court has stated previously, the factual evaluation required under step three of Batson "lies `peculiarly within a trial judge's province.'" Hernandez v. New York, 111 S.Ct. 1859, 1869 (1991).

In contrast to Purkett, the third step in a Batson challenge

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[13] See "Former Philadelphia Prosecutor Accused of Racial Bias," New York Times, April 3, 1997 (the tape shows "a candidate who apparently advised fellow prosecutors to ignore a Supreme Court ban on using race to make jury selections").

[14] See, e.g., "Bouncing the Jury-Picking Process," The American Lawyer, June 1997, p. 40.

is the one at issue here. The decisions of the state court of appeals and the state supreme court conflict with this Court's pronouncements regarding step three of Batson. Rule 10(c), Rules of the Supreme Court of the United States. Plaintiff is aware that, in Batson, the Court specifically declined "to formulate particular procedures to be followed" when a peremptory strike was challenged as discriminatory. Batson, 106 S.Ct. at 1724. By filing this petition, plaintiff does not go so far as to ask the Court to do what it declined to do in Batson. Step three was the fail-safe feature built into Batson. Purkett accentuated the importance of this fail-safe feature. The instant case effectively tests Purkett by challenging the notion, evident in the Purkett decision, that, twenty years after Batson, trial judges can be counted on to fulfill vigilantly their responsibilities under step three of Batson. This case affords the Court the opportunity to review the role of the trial judge under step three of Batson, just as in Purkett the Court reviewed the role of the trial judge under step two. Only this Court can prescribe the level of vigilance that trial judges must exercise in carrying out their responsibilities under step three of Batson. At a time when the viability of Batson is being questioned as never before, plaintiff urges the Court to seize the opportunity presented by this case and, thereby, reinvigorate Batson.

A. IT IS THE PROVINCE OF THE TRIAL COURT TO MAKE THE DETERMINATION WHETHER OR NOT AN ATTORNEY USING A PEREMPTORY STRIKE TO REMOVE AN AFRICAN AMERICAN JUROR IS ENGAGING IN PURPOSEFUL DISCRIMINATION IN VIOLATION OF BATSON.

1. The Background Of Batson

Until Batson, the use of peremptory challenges to exclude African Americans from a petit jury was governed by Swain v. Alabama, 380 U.S. 202 (1965). In Swain, the Court refused to scrutinize the actions of the attorney exercising a peremptory challenge for evidence of purposeful discrimination. Instead, Swain placed on the party opposing the peremptory what Batson

later called a "crippling burden of proof." Batson, 106 S.Ct. at 1721. Courts interpreting Swain required the party opposing peremptories to prove a pattern of striking blacks from juries over a number of cases. Batson, 106 S.Ct. at 1720. Batson overruled Swain in relevant part.

In Batson, the Court created a precise three-step procedure. The party opposing the use of a peremptory challenge must offer prima facie evidence of discriminatory jury selection. Whether a prima facie case has been established is a question of fact for the trial court. United States v. Moore, 895 F.2d 484, 486 (8th Cir. 1990). This is often referred to as step one in a Batson challenge.

Once a prima facie case has been established, the party exercising the peremptory must state on the record race-neutral reasons for the removal of the particular African American from the jury. This is often referred to as step two in a Batson challenge. In practice, it is not unusual for the trial court's handling of its duty under step one of Batson -- i.e., deciding the preliminary question whether or not a prima facie case of discrimination has been established -- to become a non-issue in a Batson appeal. When the striking attorney has explained his reasons for using the peremptory challenge (Batson step two) without a formal finding by the trial court that prima facie discrimination has been shown, reviewing courts either assume that the court must have implicitly found a prima facie case of discrimination or that the question is moot. State v. Hernandez, 63 Ohio St.3d 577, 583 (1992). This occurred in the instant case.

2. The Trial Court's Role In Implementing The Three-Step Analysis Under Batson

The trial court also must make the ultimate determination whether or not the party exercising the peremptory challenge has been guilty of purposeful discrimination. Batson, 106 S.Ct. at 1723-4; United States v. Stewart, 65 F.3d 918, 923 (11th Cir. 1995) ("Once the Batson challenger demonstrates a prima facie case of discrimination and the opposing party offers an explanation for the challenged strikes, `the trial judge determines, in light of all the facts and circumstances, whether the [Batson challenger] has

established the existence of purposeful discrimination.'"). The latter duty, which is often referred to as step three in a Batson analysis, is the one that the trial judge misunderstood in this case.

In Batson, this Court described the trial court's duty as "`a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" Batson, 106 S.Ct. at 1721. To carry out this "sensitive inquiry," the trial court must carefully evaluate the reasons offered by the striking attorney for using the peremptory challenge. Since even facially race-neutral reasons for a peremptory challenge may nevertheless be shown to be pretextual, United States v. Skeeter (sub nom. Joe), 928 F.2d 99, 102 (4th Cir. 1991), a trial court must inquire into the striking attorney's motives under step three of the Batson analysis. Pemberthy v. Beyer, 19 F.3d 857, 869 (3d Cir. 1994); United States v. Canoy, 38 F.3d 893, 900 (7th Cir. 1994). As the Court observed in Hernandez v. New York, 111 S.Ct. at 1869, "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." See also United States v. Bynum, 3 F.3d 769, 772 (4th Cir. 1993).

In People v. Hall, 35 Cal. 3d 161, 197 Cal. Rptr. 71, (1983), a California Supreme Court decision cited in Batson, 106 S.Ct. at 1724, the court held that the trial judge had to make a serious attempt to evaluate the *bona fides* of the challenging attorney's explanations, in light of all relevant circumstances. Similarly, in State v. Robertson, 90 Ohio App.3d 715, 630 N.E. 2d 422 (1993), an Ohio court of appeals held that "[t]he trial court was required to determine whether the race-neutral reason proffered by [the attorney exercising the peremptory challenge] was bona fide," id. at 726; in other words, was it "the real reason" for the peremptory challenge? Id. at 725.

3. The Factors To Be Considered Under Step Three Of Batson

According to Batson, "the totality of the relevant facts" may "give[] rise to an inference of discriminatory purpose." 106 S.Ct. at 1723; see also Turner v. Marshall, 63 F.3d 807, 812 (9th Cir.

1995) ("`[T]he combination of circumstances taken as a whole must be considered.'"). Batson and its progeny offer illustrations of circumstances that have been found to raise inferences of discrimination. Specific circumstances that may give rise to an inference of purposeful discrimination include any questions or remarks by the attorney exercising the peremptory challenge, which suggest discriminatory purpose, see United States v. Skeeter, 928 F.2d at 103; the striking attorney's disparate treatment of black and white venirepersons who shared the same qualities, see State v. Belcher, 89 Ohio App.3d 24, 34, 623 N.E. 2d 583 (1993) and United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990); and the striking attorney's credibility and demeanor. See Hernandez v. New York, 111 S.Ct. at 1869; United States v. Skeeter, 928 F.2d at 103.

4. The Necessity Of Reversal When A Trial Court Fails To Understand And Carry Out Step Three Of Batson

A trial court's failure to fulfill its factfinding duty under step three of Batson warrants reversal on appeal. A number of appellate courts throughout the country have held that the record before them demonstrated that the trial judge misunderstood, and thus did not fulfill, his or her responsibilities under Batson and that, therefore, reversal was necessary.

For example, in Turner v. Marshall, 63 F.3d 807, the trial judge undertook a Batson analysis that the Ninth Circuit found to be "incomplete." Id. at 814. According to the Ninth Circuit, "the judge declined to inquire into the prosecutor's motives for her peremptory challenges," id. at 812, which is an essential part of step three of a proper Batson analysis. Pemberthy v. Beyer, 19 F.3d at 869; United States v. Canoy, 38 F.3d at 900. The Ninth Circuit held that remand was necessary because, "[w]ith only the trial court's incomplete analysis upon which to rely, we cannot foreclose the possibility of discrimination." Turner, 63 F.3d at 814.

Similarly, in Montiel v. City of Los Angeles, 2 F.3d 335, 340 (9th Cir. 1993), a civil case, the court of appeals held that the trial judge had "clearly erred" by refusing to inquire into the

defense attorney's motives for peremptory challenges. The court of appeals ordered a new trial.

In United States v. Huey, 76 F.3d 638 (5th Cir. 1996), the Fifth Circuit held that reversal of the defendant's conviction was mandatory where the trial court had "failed to discharge its clear duty" under Batson. The court of appeals added that "only by repudiating all results from such a trial can public confidence in the integrity of this system be preserved" and that

> such mischief can be avoided with relative ease by the exercise of diligent oversight and sound judgment on the part of trial judges, and through their proper application of the well-known three-step inquiry for ensuring race-neutral use of peremptory challenges.

Id. at 641-2.

In State v. McRae, 494 N.W. 2d 252 (Minn. 1992), the trial judge apparently believed his role on a Batson challenge was merely to make sure that the reasons for the peremptory strike were articulated on the record. Id. The Minnesota Supreme Court reversed and remanded the case for a new trial. Id.

Prior to the instant case, there were two decisions from Ohio courts of appeals in cases where a trial court's failure to understand its responsibilities under Batson was apparent on the face of the record. In State v. Tuck, 80 Ohio App.3d 721, 610 N.E. 2d 591 (1992), the trial court indicated its belief that the cases cited by the party raising a Batson challenge -- presumably Batson and its progeny -- did not afford it the discretion to deny a peremptory challenge, but rather that "[t]hey only create a record of appeal of whether the challenge was given. So your record is made." Id. at 723. The Court of Appeals for Franklin County, Ohio held that the trial court had failed to fulfill its responsibilities under Batson and reversed.

In State v. Robertson, 90 Ohio App.3d 715, a decision of the Court of Appeals for Montgomery County, Ohio, the court of appeals observed: "The record demonstrates that the trial court erred in its understanding of its proper role with respect to a Batson

challenge." Id. at 722. The court added:

> It was the responsibility of the trial judge to determine whether [the proffered reason] was the real reason for the state's having peremptorily challenged [the prospective juror], and *it is clear from the record that the trial judge was under the erroneous impression that that was no concern of his*.

Id. at 725 (emphasis added). The court of appeals further stated:

> The record in this case clearly portrays error. The trial court was required to determine whether the race-neutral reason proffered by the state was bona fide, and it clearly failed to do so, having erroneously concluded that that was not for it to determine.

Id. at 726. Concluding that there was no way the proffered reason for having peremptorily challenged the prospective juror "can be evaluated from a sterile transcript," the Robertson court held that reversal and remand were mandatory.

B. IN THIS CASE, THE TRIAL JUDGE MISUNDERSTOOD THE PURPOSE AND SIGNIFICANCE OF BATSON AND FAILED TO APPRECIATE HIS RESPONSIBILITIES UNDER BATSON, INCLUDING HIS DUTY TO INQUIRE INTO AND DETERMINE WHETHER OR NOT DEFENSE COUNSEL'S USE OF A PEREMPTORY STRIKE AGAINST JUROR ADAMS CONSTITUTED PURPOSEFUL DISCRIMINATION.

The instant case is strikingly similar to Tuck, Robertson, and McRae in that the trial judge here indicated he was aware of Batson, but nowhere in the record does the trial judge demonstrate the slightest understanding of his responsibility under step three of

Batson. On this point, the court of appeals was in complete agreement with plaintiff.

After reviewing the record, the court of appeals concluded that the trial court "misunderstood the purpose of and the inferences permitted by the Batson line of cases." App. B, p. A25. Yet, instead of reversing and remanding the case to the trial court, the court of appeals undertook its own evaluation of defense counsel's reasons for excluding Juror Adams, finding them to be not just "race-neutral," but also "valid" reasons for challenging Juror Adams. Id. The court of appeals' assumption of the responsibility to conduct what Batson called the "`sensitive inquiry into such circumstantial and direct evidence of intent as may be available,'" Batson, 106 S.Ct. at 1721 -- including whether defense counsel's explanation represented the real reasons for striking Juror Adams or merely a pretext for discrimination -- was an inadequate substitute for an evaluation by the trial judge.

The Supreme Court of Ohio held that the court of appeals was incorrect in concluding that the trial judge "misunderstood" the procedure for resolving a Batson challenge. 78 Ohio St.3d at 102 (App. A, p. A14). The closest the state supreme court came to acknowledging that the trial judge's handling of the Batson issue was constitutionally deficient were the court's characterizations of the trial judge's Batson inquiry as "less than artful" and "imperfect in form." But this is not a case of unartful articulation by a trial judge. The trial judge could not have articulated more clearly *his* understanding of his responsibility under Batson: when plaintiff's trial counsel began to discuss Batson, the trial judge interrupted, stating that he was "aware" of the case, but that "*the only thing that I understand that it requires is an explanation on the record.*" (Emphasis added.)

The decision of the Supreme Court of Ohio does not mention this statement by the trial judge, much less explain how such a statement can be reconciled with the state supreme court's ultimate conclusion that "the trial court understood and properly applied the Batson test." Id. (App. A, p. A9). A trial judge who truly understands his responsibilities under step three of Batson would never make such a statement. This statement confirms that the trial court's grasp of Batson did not extend past step two -- the

stage at which the striking attorney explains the peremptory challenge on the record. Notwithstanding the statements made by the trial judges in Tuck, Robertson, and McRae, and now in this case, the trial judge's role under Batson is not limited to compelling parties to articulate their positions on the Batson issue so that appellate scrutiny can be cleaner. It is elemental that Batson requires not just that there be "an explanation on the record," but also that the trial judge actually take the time to evaluate the explanation. Step three of Batson is crucial to guaranteeing that the Equal Protection Clause has not been violated. Appellate tribunals must demand that every trial judge undertake the step three evaluation as if important constitutional rights were at stake -- because, in fact, they are. The decision of the Supreme Court of Ohio demonstrates its unwillingness to demand such vigilance of trial judges under its superintendence.

Plaintiff does not fault the Supreme Court of Ohio for the way it articulated the standard trial judges must meet under step three of Batson. Rather, plaintiff faults the state supreme court for failing to apply the standard it articulated. The state supreme court deserves much credit for articulating a standard that all trial judges should be required to meet in conducting their Batson inquiries. The court observed:

> Trial judges must exercise considerable care in reviewing a claim of racial discrimination in jury selection. A judge should make clear, on the record, that he or she understands and has applied the precise Batson test when racial discrimination has been alleged in opposition to a peremptory challenge.

78 Ohio St.3d at 99 (App. A, p.A9). This standard affords due regard to the constitutional significance of the trial judge's evaluation under step three of Batson. Unfortunately, the state supreme court failed to recognize that the trial judge in this case did not meet this standard. The trial judge simply did not view the evidence and arguments before him with the careful scrutiny that constitutional issues naturally demand and deserve. At one point,

he even appeared to believe that the issue raised by plaintiff was governed by a federal rule of court, rather than by constitutional pronouncements of this Court.

While not mentioning the trial judge's statement that "the only thing that I understand that it [Batson] requires is an explanation on the record," the state supreme court did refer to two actions by the trial judge, ostensibly to support its view that the trial judge "understood and properly applied the Batson test." 78 Ohio St.3d at 99 (App. A, p. A9). In the part of its decision where it addressed step three of Batson, the state supreme court pointed out that (1) "[t]he judge required counsel for both parties to explain their positions," id. at 102 (App. A, p. A13), and (2) the judge "stated his skepticism about the presence of racial motive by saying that `probably it should be that the choice you're making is not based on racial' (was interrupted by counsel) . . . ." Id. Applying the state supreme court's own standard, does the fact that the trial judge required the parties to explain their positions on the record and made the other statement just quoted "make clear, on the record, that he . . . understands and has applied the precise Batson test when racial discrimination has been alleged in opposition to a peremptory challenge"? Id. at 99 (App. A, p. A9). The answer must be "no."

Requiring the parties to explain their positions on the record only goes to show that the litigants' procedural responsibilities under steps one and two of Batson had been fulfilled -- i.e., that plaintiff articulated a prima facie case, and defendants responded by articulated their reasons for the peremptory strike. As noted above, steps one and two of Batson are not at issue in this case. The fact that the trial judge required such explanations from the parties does not "make clear, on the record, that" the trial judge performed any evaluation whatsoever of any explanation proffered or reached any conclusions as to whether or not the reasons proffered should be believed, as required by step three of Batson.

Moreover, to the extent the state supreme court concluded that the trial judge "stated his skepticism about the presence of racial motive by saying that `probably it should be that the choice you're making is not based on racial,'" id. at 102 (App. A, p. A13), the state supreme court has misread the record, as even

defense counsel's retort to the judge's remark shows. In the passage cited by the state supreme court at page 102 of its decision (App. A, p. A13), the trial judge stated, "And probably it -- probably it should be that the choice you're making is not based on racial, that --" At that point, defense counsel interrupted, saying "Well, I said that, Your Honor." The state supreme court somehow read the trial judge's words "probably it should be" as the beginning of the judge's revelation of his own thinking on the Batson issue and the rest of the judge's statement -- "that the choice you're making is not based on racial, that --" -- as referring to the judge's "skepticism about the presence of racial motive . . . ." 78 Ohio St.3d at 102 (App. A, p. A13). But the context of the remark, in particular the fact that defense counsel interrupted the judge to point out, "Well, I said that, Your Honor," shows that the judge's remark was not to be taken as any revelation of the judge's own evaluation of the evidence of discrimination, but rather as yet another indication of the limited role that the trial judge saw for himself under Batson. To be blunt, the trial judge was doing what defense counsel seems to have assumed he was doing -- telling defense counsel what to say for the record. The word "it" in the trial judge's remark "probably it should be" doubtless referred to the explanation that was being stated on the record. After all, as the judge had already explained, "an explanation on the record" was "the only thing that I [the trial judge] understand that it [Batson] requires . . . ." It strains credulity to conclude, as the state supreme court evidently did, that these are the words of a trial judge who is aware he is evaluating evidence relevant to whether or not the Constitution of the United States is being violated.

In its decision, the state supreme court took note of only one other quote from the trial judge's statements in the record. In an earlier part of its decision, the state supreme court quoted the trial judge as stating in his order denying plaintiff's motion for new trial that Juror Adams "was `not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom." 78 Ohio St.3d at 100 (App. A, p. A11). This statement also does not show that the trial judge understood and fulfilled his role under step three of Batson. Nothing the trial judge said -- or could have said -- *after* the trial on

the Batson issue, could substitute for a proper and timely Batson step three evaluation. In Batson cases, the explanation of counsel must be placed on the record and evaluated immediately, while there is still time to reinstate the struck juror. United States v. Skeeter, 928 F.2d at 103-4 (post-trial evaluation is improper).

In any event, the trial judge's order denying plaintiff's motion for a new trial, which the Supreme Court of Ohio quoted and deemed significant (78 Ohio St.3d at 100), actually serves as a further indication that the trial judge had not performed a proper evaluation under step three of Batson. If the trial judge's order (App. C) reveals anything of relevance, it is that the trial judge, *even after the trial*, still did not understand his responsibilities under step three of Batson. In his order denying plaintiff's motion for a new trial, the trial judge said, "Whatever may have been in the mind of counsel for either party, the Court was not indulging in an effort to impanel a racially imbalanced jury." App. C, p. A34 (New Trial Decision, p. 1). The trial judge's words -- "[w]hatever may have been in the mind of counsel for either party" -- are telling because they show that, even after he had had the benefit of full post-trial briefing on the Batson issue, the trial judge still did not understand that it had been his responsibility to evaluate the state of mind of defense counsel under step three of Batson. The striking attorney's motives and state of mind are central to step three of Batson and, therefore, cannot be disregarded by the trial court. See United States v. Bynum, 3 F.3d at 772 ("the trial court must inquire into the party's motives"); Pemberthy v. Beyer, 19 F.3d at 869; United States v. Canoy, 38 F.3d at 900. The question for the trial judge under step three of Batson was whether or not defense counsel intended to discriminate, not whether the trial judge himself intended to discriminate. If the trial judge had actually conducted a proper inquiry under Batson step three (as the Supreme Court of Ohio concluded he had), the trial judge would have had his own view of what was "in the mind of counsel for" defendants when they exercised their peremptory against Juror Adams. Instead, the trial judge's post-trial order, echoing the incorrect views of the trial courts in Tuck, Robertson, and McRae, showed that he was still under the mistaken impression that defense counsel's discriminatory mindset was none of his concern. In his order denying plaintiff's

motion for a new trial, the trial judge never mentioned, much less validated, any of the reasons that defense counsel had given during voir dire for striking Juror Adams. The trial judge clearly misunderstood the purpose of Batson and failed to appreciate his essential responsibilities under step three of Batson.

C. HAD THE TRIAL JUDGE CONDUCTED THE PROPER EVALUATION UNDER STEP THREE OF BATSON, HE WOULD HAVE FOUND ABUNDANT EVIDENCE UPON WHICH TO CONCLUDE THAT DEFENSE COUNSEL'S EXPLANATION FOR STRIKING JUROR ADAMS WAS A PRETEXT FOR RACIAL DISCRIMINATION.

In its decision, the state supreme court observed that "the relevant circumstances surrounding this proceeding appear largely devoid of any meaningful events that might have supported an inference of discriminatory purpose" and that defense counsel did not "make any statements during voir dire that were reflective of a discriminatory purpose." Id. at 100 (App. A, p. A9). The state supreme court found it was "simply not plausible that [defendants] employed a racial `double standard' during voir dire; rather, [defendants] sought to empanel a jury able to understand all aspects of a potentially complex case." Id. at 101 (App. A, pp. A12-A13).

The challenge confronting a trial judge under step three of Batson is to discern, usually based on the striking attorney's statements and demeanor alone, any clues as to whether or not the attorney is of a mind to discriminate against African American venirepersons in jury selection. These clues may consist of subtle indications that the attorney is endeavoring to eliminate as many African American venirepersons as possible and, at the same time, to retain as many white venirepersons as possible. Misleading a trial judge on both the facts and the law in order to secure the "for cause" removal of a black juror and in order to justify a peremptory strike against a black juror -- which defense counsel did seven times in this case -- is more than a subtle indication that the attorney was attempting to minimize the number of African Americans on the jury. See pp. 9-11, *ante*.

In reaching its conclusion that the proceedings were "largely devoid of any meaningful events that might have supported an inference of discriminatory purpose," the state supreme court overlooked defense counsel's misrepresentations. In addition, the state supreme court overlooked the evidence of the "double standard" that defense counsel applied to white and black jurors during voir dire (see pp. 5-6, 8-9, *ante*), which represented circumstantial evidence that defense counsel were "of a mind to discriminate" and that their protestations to the contrary could not be believed. The plaintiff was black. All of the African American venirepersons were clearly concentrated in the foreground of the venire. In Ohio, six jurors out of eight are enough for a civil verdict, while three can block one. Based on these circumstances, the trial judge should have been mindful from the outset of voir dire that defendants might be motivated to eliminate African Americans from the venire. At the very least, if the trial judge had truly understood his responsibilities under step three of Batson, the statement by one defense attorney to another, "[W]ell, at least we don't have an all-black jury," should have awakened him to the fact that defense counsel were of a mind to discriminate. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 711 (1987) (The striking attorney's extraneous statement urging the jury clerk to minimize the number of blacks in the venire was relevant under Batson.).

CONCLUSION

The constitutional protections which Batson guarantees were not forthcoming from the trial court, the court of appeals, or the state supreme court. Batson and its progeny clearly contemplate that a trial court will inquire into and determine whether or not the striking attorney's proffered reasons for peremptorily challenging an African American venireperson should be believed. Yet, the trial court in this case believed -- and so indicated on the record -- that its responsibility under Batson ended when the striking attorney articulated reasons for the strike. Although the court of appeals appeared to recognize that the trial court was mistaken in taking such an uncritical approach to the striking attorney's proffered reasons, it chose not to reverse, but

instead to arrogate to itself the trial court's factfinding function under step three of Batson. When a trial judge shows by his own words that he fails to grasp a constitutional issue, when the judge thus fails to fulfill his responsibility regarding the issue, which responsibility, this Court has held, "lies `peculiarly within [his] province,'" when a court of appeals impermissibly arrogates to itself the trial judge's factfinding function, and when the state supreme court overlooks the trial judge's failure to do his constitutional duty as if it were merely "less than artful" and "imperfect in form," this Court should intercede.

For all of the foregoing reasons, petitioner Diane Hicks respectfully urges the Court to grant her petition and set this case for briefing and argument, or, in the alternative, to grant her petition, enter summary reversal, and remand this case for further proceedings.

Respectfully submitted,

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APPENDIX A

In The Supreme Court of Ohio

Diane T. Hicks, Appellant, v. Westinghouse Materials Company; NLO, Inc., et al., Appellees.	)	**OPINION**

Trial procedures -- Jury selection -- Racial discrimination -- Exercise of peremptory challenge against prospective African-American juror in workers' compensation suit does not violate constitutional law, when -- Application of standard articulated in Batson v. Kentucky.

(No. 95-2314 -- Submitted November 12, 1996 -- Decided April 2, 1997.)

Appeal from the Court of Appeals for Hamilton County, No. C-940094.

Hicks v. Westinghouse Materials Co.
(1997), 78 Ohio St.3d 95

Diane T. Hicks, appellant, filed a claim in 1987 seeking participation in the State Insurance Fund for the alleged radiation-induced death of her husband, Larry Hicks, while he was employed at appellee NLO, Inc., a contractor that operated the U.S. Department of Energy's uranium processing facility at Fernald, Ohio. Appellant asserted that an accident at the Fernald plant exposed her husband to radiation, causing him to develop acute interstitial myocarditis -- an inflammation of the heart muscle -- from which he died. The Industrial Commission of Ohio denied the claim in 1989; pursuant to R.C. 4123.519, Hicks appealed to the Hamilton County Court of Common Pleas.

When the voir-dire phase of the trial commenced, the prospective jury pool consisted of thirty-four persons. Voir dire continued until a jury of eight was selected. Two of those jurors, like Hicks, were African American. The trial proceeded, and the jury ultimately rendered a verdict against Hicks, denying her claim and finding in favor of the defendants-appellees.

During the course of voir dire, Hicks objected to the appellees' use of a peremptory challenge against prospective juror Donna Adams, also an African American. Appellant claimed that appellees were solely motivated by racial bias in exercising the peremptory strike. Following a request by the trial judge for an explanation as to why appellees wished to exclude Adams, counsel for the appellees responded:

"MR. HAWKINS: Yeah. Miss Adams is - Miss Adams is an unemployed woman who has a very limited educational

background. This is a case that involves some technical issues and medical testimony.

"We're concerned by the answers that we received yesterday that those issues require a certain level of education, a certain level of sophistication that may not be present in this particular juror. And that's why we are asking peremptorily that she be taken off the panel. And this is directed -- this is not a racial issue and it has nothing to do with race. It is an issue that deals with what we think to be her duty to function as a juror in this case."

Shortly thereafter, appellees' counsel added:

"MR. HAWKINS: But we're making a determination based upon what we think is their ability to understand issues, watch their reactions to questions. And it's not just questions that you ask; it's the reaction to other questions that are asked and their reactions to that."

Counsel for both parties then engaged the trial court in a discussion about the qualifications of Adams relative to others in the jury pool. Near the end of that exchange, the trial judge stated:

"THE COURT: And probably it -- probably it should be that the choice you're making is not based on racial, that --"

Appellees' counsel then reasserted that their peremptory challenge was not based on racial grounds,

referring again to their view that based on responses to questions posed earlier in voir dire, not all jurors had the same ability to fully understand the issues of the case. Following a brief discussion about whether appellees' counsel had rebutted the claim pursuant to *Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660, the trial judge stated:

"THE COURT: Well, we'll accept the statement as complying with the Federal Court rule and --"

Appellees' counsel then suggested the judge had misspoken. The judge elaborated:

"THE COURT: I know. Whatever you said. Whatever citation you've got there, the Supreme Court decision."

The trial court then excused Adams.

In its decision denying appellant's motion for a new trial after the jury rendered a verdict for the defendants-appellees, the trial court explained its position on appellant's claim of racial discrimination:

THE COURT: Every effort was made to select a fair and impartial jury. Whatever may have been in the minds of counsel for either party, the Court was not indulging in an effort to impanel a racially imbalanced jury."

* * *

"Donna Adams, aside from her want of normal secondary education, was, in the Court's opinion, not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom."

Hicks timely appealed the judgment of the trial court to the Court of appeals for Hamilton County, arguing, *inter alia*, that appellees' exercise of a peremptory challenge removing Adams from the venire constituted racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court of appeals disagreed and affirmed the trial court's judgment. The appellate court stated that the trial court had "misunderstood" the procedure for resolving a claim of racial discrimination in jury selection, as outlined in *Batson v. Kentucky* (1986), 476 U.S. 79, 96-98, 106 S. Ct. 1712, 1723-1724, 90 L. Ed. 2d 69, 87-89. The court of appeals employed its own review of the record and held that because appellees asserted valid, race-neutral reasons for exercising their peremptory challenge, the trial court's decision was not clearly erroneous.

This cause is now before us pursuant to the allowance of a discretionary appeal.

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Louise M. Roselle and *Paul M. DeMarco*, for appellant.

Frost & Jacobs, William H. Hawkins II and *Jack B.*

Harrison, for appellee NLO, Inc.

Betty D. Montgomery, Attorney General, and *William D. Haders*, Assistant Attorney General, for appellees Administrator, Bureau of Workers' Compensation, and Industrial Commission of Ohio.

MOYER, C.J. The question presented in this appeal is whether the trial court conducted a proper constitutional analysis as outlined in *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69, in determining that appellees were not racially motivated in excluding an African American from the jury through the use of a peremptory challenge. Our view of the law and record compels us to conclude that the trial judge properly applied the standard as articulated in *Batson*. Accordingly, we cannot say that the decision of the trial court to grant appellees' peremptory strike was clearly erroneous. We therefore affirm the judgment of the court of appeals and hold that the peremptory challenge exercised by appellees did not violate constitutional law.

I

The United States Supreme Court set forth in *Batson* the test to be used in determining whether a peremptory strike is racially motivated. First, a party opposing a peremptory challenge must demonstrate a prima-facie case of racial discrimination in the use of the strike. *Id.* at 96, 106 S. Ct. At 1728, 90 L. Ed. 2d at 87. To establish a prima-facie case, a litigant must show he or she is a member of a cognizable racial group and that the peremptory challenge will remove a

member of the litigant's race from the venire. The peremptory-challenge opponent is entitled to rely on the fact that the strike is an inherently "discriminating" device, permitting "'"those to discriminate who are of a mind to discriminate."'" *State v. Hernandez* (1992), 63 Ohio St.3d 577, 582, 589 N.E.2d 1310, 1313, certiorari denied (1992), 506 U.S. 898, 113 S. Ct. 279, 121 L. Ed. 2d 206. The litigant must then show an inference or inferences of racial discrimination by the striking party. The trial court should consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present. *See Batson* at 96-97, 106 S. Ct. At 1723, 90 L. Ed. 2d at 88.

Assuming a prima-facie case exists, the striking party must then articulate a race-neutral explanation "related to the particular case to be tried." *Id.* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88. A simple affirmation of general good faith will not suffice. However, the explanation "need not rise to the level justifying exercise of a challenge for cause." *Id.* at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88. The critical issue is whether discriminatory intent is inherent in counsel's explanation for use of the strike; intent is present if the explanation is merely a pretext for exclusion on the basis of race. *Hernandez v. New York* (1991), 500 U.S. 352, 368, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395, 408.

Last, the trial court must determine whether the party opposing the peremptory strike has proved purposeful

discrimination. *Purkett v. Elem* (1995), 514 U.S. ____, ____, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834, 839. It is at this stage that the persuasiveness, and credibility, of the justification offered by the striking party becomes relevant. *Id.* at ____, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839. The critical question, which the trial judge must resolve, is whether counsel's race-neutral explanation should be believed. *Hernandez v. New York*, 500 U.S. at 365, 111 S. Ct. at 1869, 114 L. Ed. 2d at 409.

II

Initially we observe that the *Batson* framework is designed to ensure a juror-selection *process* free from racial discrimination. No litigant can claim entitlement to a jury which includes members of a particular racial group. *See, generally, Batson*, 476 U.S. at 85-86, 106 S. Ct. at 1717, 90 L. Ed. 2d at 80. *Batson* and its progeny prohibit racial discrimination in jury selection, now only to comply with constitutional requirements but also to protect the integrity of the judicial process. This constitutional mandate exists in both criminal and civil actions. *See Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660. Whenever a party opposes a peremptory challenge by claiming racial discrimination, the duty of the trial court is to decide whether granting the strike will contaminate jury selection through unconstitutional means. Therefore, in analyzing the trial court's actions here, we must determine whether the trial judge's analysis of the contested peremptory strike was sufficient to preserve a constitutionally permissible jury-selection process.

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Hicks contends that the trial judge failed to properly apply *Batson*, and thereby abused his discretion by sustaining the motion to peremptorily strike Donna Adams. We disagree. Given the record and applicable constitutional law, we can only conclude that the trial court's ruling, while imperfect in form, was constitutionally sufficient. We qualify this conclusion with caution. Trial judges must exercise considerable care in reviewing a claim of racial discrimination in jury selection. A judge should make clear, on the record, that he or she understands and has applied the precise *Batson* test when racial discrimination has been alleged in opposition to a peremptory challenge. Here, we conclude from a careful reading of the record that the trial court understood and properly applied the *Batson* test.

Appellant's prima-facie case was tenuous. Following appellees' request to strike Adams, counsel for the appellant stated:

"MR. GRUNES: Your honor, before Miss Adams is excused, we'd like to make a motion directed at peremptory challenges of black jurors by the defendants."

We assume, *arguendo*, that counsel's general assertion sought to specifically contest Adams's removal. Applying *Batson*, it is questionable that this statement, without more, raises an inference of racially discriminatory jury selection. Similarly, the relevant circumstances surrounding this proceeding appear largely devoid of any meaningful events that might have supported an inference of discriminatory purpose. Adams was the first, and only, African American peremptorily struck from the jury. There was no "pattern of

strikes" against African American jurors, nor did appellees' counsel make any statements during voir dire that were reflective of a discriminatory motive. *See Batson* at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88. Nonetheless, the trial judge directed appellees' counsel to explain their reasons for the peremptory strike, thereby accepting appellant's prima-facie argument. *See Hernandez v. New York*, 500 U.S. at 359, 111 S. Ct. at 1866, 114 L. Ed. 2d at 405.

In response, appellees' counsel reasoned that Adams, in their view, was incapable of understanding the complexities of the case, based on her responses to questions posed during voir dire. Counsel also reflected concern about her educational background, and questioned her basic ability to function as a juror. Appellees denied any racial motive whatsoever. Following this explanation, the trial judge engaged counsel for both parties in a lengthy exchange regarding Adams's qualifications relative to those of others in the venire. At that point, the trial judge accepted that appellees' counsel had articulated a "neutral explanation related to the particular case ***," *Batson* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 88, and began to determine if appellant had established purposeful discrimination pursuant to the last component of the *Batson* framework.

Hicks asserts that appellees employed a "double standard" in their treatment of Caucasian and African-American venire members throughout voir dire. Appellant asserts further that the educational level of other venire members challenged by appellees demonstrates that the stated concern about Adams' educational background was merely

pretextual. Our analysis of the jury selection process does not produce the same conclusion.

We are convinced that the trial judge could have properly found that appellees had put forth a race-neutral explanation for excluding Adams. Appellees stated a concern about Adams's ability to understand the complexities of the case. Counsel based this view upon Adams's responses to questions posed during voir dire and her educational background. It is reasonable to conclude that given the nature of the case, appellees had a legitimate concern about Adams's ability to understand the case, a view reinforced by the trial judge's statement in ruling on appellant's motion for a new trial that Adams was "not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom." Appellees repeatedly denied that the issue was race-based, and made no facially discriminatory statements in offering their explanation.

To the contrary, appellees were primarily concerned with ensuring an impartial, yet reasonably sophisticated, jury. Three of the seven venire members challenged by the appellees and removed for cause by the court either knew the appellant or had some connection with the Fernald plant. The remaining four venire members spoke negatively of Fernald, or simply stated their inability to be impartial. While all seven members in fact had more education than Adams, it is not unreasonable to conclude that the trial court, in making the ultimate decision to dismiss these venire members, simply questioned their ability to perform impartially on the jury. In

seeking to root out any hint of bias, these dismissals contradict appellant's portrayal of the trial judge as deficient in managing the voir-dire process. While it is true that appellees' stated concerns about these venire members did not resemble their concerns related to Adams, peremptory challenges do not require explanations sufficient to that justification necessary to uphold a challenge for cause. *Batson* at 97, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88.

In addition, a review of appellees' peremptory challenges, and the final composition of the jury, demonstrates that appellees' stated opposition to Adams was neutral and related to the case to be tried. *Id.* at 97-98, 106 S. Ct. at 1723-1724, 90 L. Ed. 2d at 88-89. Appellees' use of another peremptory challenge to exclude venire member Corbett, who had approximately the same education as did Adams, reflected appellees' desire to ensure a jury with the greatest amount of education and sophistication from those left in the prospective jury pool. All final eight jurors possessed greater educational qualifications than Adams or Corbett. Six jurors had at least completed high school, while two had attended college; all indicated current or previous employment, in contrast to Adams. Although one alternate juror had only completed tenth grade, both parties had exhausted all peremptory challenges at the time this juror was seated. Thus, appellees had no choice but to accept her presence as an alternate member of the panel. Moreover, appellees did not challenge the two African-American jurors eventually seated at any point during voir dire. It is simply not plausible that appellees employed a racial "double

standard" during voir dire; rather, appellees sought to empanel a jury able to understand all aspects of a potentially complex case. We cannot therefore reach the conclusion that appellees' explanation for their strike against Adams was pretextual.

We now consider the trial judge's ultimate conclusion that appellees did not evince discriminatory intent in excluding Adams. Once the trial court began to question both parties about Adams's qualifications subsequent to appellees' proffered explanation, the judge then had the responsibility to determine if the appellant had established purposeful discrimination. *See Batson* at 97-98, 106 S. Ct. at 1723-1724, 90 L. Ed. 2d at 88-89. We believe the trial court conducted a sufficient inquiry. Nothing in the exchange leading to the trial judge's acceptance of the "Federal Court rule" can reasonably persuade us that the trial court was improperly applying *Batson*. The judge required counsel for both parties to explain their positions. He stated his skepticism about the presence of racial motive by saying that "probably it should be that the choice you're making is not based on racial" (was interrupted by counsel), and then ultimately granted the peremptory challenge.

Review of a *Batson* claim largely hinges on issues of credibility. Accordingly, we ordinarily defer to the findings of the trial court. *See Batson* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, fn. 21. Whether a party intended to racially discriminate in challenging potential jurors is a question of fact, and in the absence of clear error, we will not reverse the trial court's determination. *Hernandez v. New York*, 500

U.S. at 369, 111 S. Ct. at 1871, 114 L. Ed. 2d at 412; *State v. Hernandez*, 68 Ohio St.3d at 583, 589 N.E.2d at 1314. Trial judges, in supervising voir dire, are best equipped to resolve discrimination claims in jury selection, because those issues turn largely on evaluations of credibility. *See Batson* at 98, 106 S. Ct. at 1724, 90 L. Ed. 2d at 89, fn. 21.

We therefore do not agree with the court of appeals that the trial court "misunderstood" *Batson*. While less than artful, the trial court conducted a proper *Batson* inquiry. We do not sit as arbiters of eloquence. Our review is limited to determining from the record whether the trial court applied *Batson* in a sufficient manner. The trial court fulfilled its basic constitutional duty; appellees' peremptory strike did not unconstitutionally compromise the integrity of the jury selection process in any way.

A trial court's resolution of a *Batson* claim is not clearly erroneous where there are two permissible views of the evidence. *Hernandez v. New York*, 500 U.S. at 369, 111 S. Ct. at 1871, 114 L. Ed. 2d at 412. In light of the explanation for Adams' dismissal offered by the appellees, coupled with the noteworthy absence of a reasonably indicative pattern of an intent to racially discriminate, the trial court could have permissibly concluded that appellees' strike was not race-based. Accordingly, the trial court's decision to allow appellees' peremptory challenge was not clearly erroneous.

The judgment of the court of appeals is affirmed.

Judgment affirmed.

RESNICK, F.E. SWEENEY, PFEIFER, COOK and

LUNDBERG STRATTON, JJ., concur. DOUGLAS, J., concurs in judgment only.

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DIANE HICKS	:	APPEAL NO. C-940094
Plaintiff-Appellant,	:	TRIAL NO. A-8910895
v.	:	
WESTINGHOUSE	:	
MATERIALS CO.,	:	OPINION
Defendant,	:	
	:	Presented to the Clerk
and	:	of Courts for Filing
	:	Sep. 27, 1995
NLO, INC.,	:	COURT OF APPEALS
and	:	
J. WESLEY TRIMBLE,	:	
ADMINISTRATOR,	:	
OHIO BUREAU OF	:	
WORKERS'	:	
COMPENSATION,	:	
and	:	
THE INDUSTRIAL	:	
COMMISSION OF	:	
OHIO,	:	
Defendants-	:	
Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas
Judgment Appealed From is: Affirmed
Date of Judgment Entry on Appeal: September 27, 1995

Waite, Schneider, Bayless & Chesley, Louise M. Roselle, Esq., No. 0014844, Allen P. Grunes, Esq., No. 0001028, and Paul M. DeMarco, Esq., No. 0041153, 1513 Central Trust Tower, 5 West Fourth Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Frost & Jacobs, William H. Hawkins, Esq., No. 0003865, Mark H. Klusmeier, Esq., No. 0005588, and Jack B. Harrison, Esq., No. 0061993, 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, for Defendant-Appellee NLO, Inc.,

William D. Haders, Esq., No. 0029157, 1700 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, for Defendants-Appellees, J. Wesley Trimble, Administrator, Ohio Bureau of Workers' Compensation, and the Industrial Commission of Ohio.

GORMAN, P.J.

Plaintiff-appellant Diane Hicks appeals from the entry of judgment for defendants-appellees NLO, Inc., and the Industrial Commission of Ohio following a verdict in which the jury denied her claim for workers' compensation death benefits for the work-related death of her husband Larry Hicks, and from the denial of her subsequent motion for a new trial. Raising three assignments of error, she argues that the trial court erred by: (1) permitting the appellees to exercise certain peremptory challenges and challenges for cause during jury selection; (2) not declaring a mistrial or granting her motion for a new trial due to an improper reference by appellees' medical expert to Larry Hicks's alcohol use; and (3) failing to include Hicks's special instructions in its charge to the jury. Appellees, pursuant to R.C. 2505.22, have also raised their single assignment of error claiming the court erred in denying their motion for a directed verdict. We find that none of these assignments are well taken, and affirm the judgment of the court below.

Larry Hicks worked at the Feed Materials Production Center for twelve years starting in 1973. The center was operated by appellee NLO, Inc., for the United States government, and is located at Fernald, Ohio. On May 8, 1985, Hicks was cleaning uranium slabs and skids with a large industrial vacuum cleaner. An apparent leak or malfunction in the in the vacuum spewed a cloud of dust over and above Larry Hicks. The dust cloud contained triuranium octaoxide, referred to as black oxide, a radioactive material. Emergency procedures were implemented in the building.

Twelve days later, Larry Hicks was too sick to report to work. He sought medical attention from his personal

physician, but died later in a hospital emergency room. The Hamilton County Coroner's office performed an autopsy and determined the cause of death to be acute interstitial myocarditis -- a recent inflammation of the heart muscle. Internal organs and tissues of Larry Hicks, including his lungs, lymph nodes, stomach, intestines, trachea, kidney, spleen, testes, thyroid, patella, and clavicle, were removed from his body and sent to the national laboratory at Los Alamos, New Mexico. The tissues were tested for the presence of uranium by burning them to ash and then analyzing the residue. The laboratory's results showed that Larry Hicks's left lung contained 1600 times the amount of uranium found in a person not exposed to radioactive materials.

In 1989, the industrial commission denied Hicks's 1987 claim for benefits relating to the 1985 death of Larry Hicks. Pursuant to R.C. 4123.519, she filed a *de novo* appeal in the Hamilton County Court of Common Pleas seeking participation in the state industrial found.

At trial, she attempted to prove that the exposure to black oxide, and the radiation emanating from it, caused Larry Hicks to develop acute interstitial myocarditis. Appellees denied her theory and ascribed Larry Hicks's mycarditis to a variety of other possible causes including a potassium imbalance resulting from improper administration of the drug Combipres, prescribed for treatment of his hypertension. Following the entry of judgment on the verdict in a two-week jury trial, Hicks now brings this appeal.

We first note the harsh result of the jury's verdict. The record contains ample evidence from which a jury could have concluded that Larry Hicks was mortally injured by exposure to the radiation contained in the cloud of black oxide

at his workplace, and that his death twelve days later was a direct and proximate result of that exposure.

Nonetheless, judgments supported by some competent, credible evidence going to all the essential elements of the case or defense will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. V. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. In applying this standard, a court of appeals is guided by the presumption that the findings of the trier of fact are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. It is axiomatic that "[o]n the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The underlying reason for this deference is that "the trier of fact is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and to use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d at 80, 461 N.E.2d at 1276.

Here, however, Hicks has not raised in her brief the propriety of the jury verdict. The restraint on this court's authority to proceed *sua sponte* in this matter stems, in part, from App.R. 12(A)(1)(b), which admonishes a reviewing court to "determine the appeal on its merits on the assignments of error set forth in the briefs." Absent an assignment of error contending that the jury's verdict was against the manifest weight of the evidence, we choose not to invade the jury's important fact-finding function.

In her first assignment of error, Hicks contests the manner in which the jury was selected and seated. She claims

the trial court erred in permitting appellees to exclude systematically five non-white jurors by their challenges for cause and by their use of peremptory challenges. She contends the trial court also erred in failing to grant a new trial on these grounds.

She first claims that the trial court erred in sustaining the challenge for cause of three prospective jurors on the basis of bias or predisposition about the Fernald facility or the parties.

The decision to disqualify a juror for bias is a discretionary function of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 168-169, 559 N.E.2d 1301, 1309; *Maddex v. Columber* (1926), 114 Ohio St. 178, 183, 151 N.E. 56, 57. Where a trial court is vested with such authority, reversal on appeal is justified only if its exercise of that authority constitutes an abuse of discretion. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601; *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83, 87.

Here, the trial court had the opportunity to observe the demeanor of the prospective jurors and to evaluate firsthand their responses to questions. The parties were able to present arguments for and against the exercise of the challenges. We will not substitute our judgment for that of the trial court. Therefore, we cannot say the trial court abused its discretion in permitting these three challenges for cause.

Appellant next claims appellees exercised peremptory challenges to remove two prospective jurors on account of their race, in violation of the Equal Protection Clause of the United States Constitution. *Batson v. Kentucky* (1986), 476 U.S. 79, 89, 106 S. Ct. 1712, 1719. She contests the

exclusion of prospective jurors Donna Adams, an African-American, and Usha Balasubramaniam, a native of Sri Lanka.[1]

The trial court permitted the exercise of both peremptory challenges, relying upon justifications offered by appellees during voir dire. The court's written explanation, found in its decision on appellant's motion for a new trial (t.d. 133), reads, in pertinent part:

> 1. RACIALLY DISCRIMINATORY JURY SELECTION
>
> Every effort was made to select a fair and impartial jury. Whatever may have been in the minds of counsel for either party, the Court was not indulging in an effort to impanel a racially imbalanced jury.
>
> ***
>
> Donna Adams, aside from her want of normal secondary education, was, in the Court's opinion, not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom.
>
> Usha Balasubramaniam, although swarthy of complexion, is not of the minority

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[1] The record does not indicate a timely objection to the exercise of a peremptory challenge against the latter prospective juror. Counsel must object to a racially motivated use of peremptory challenges prior to the jury's being sworn. *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S. Ct. 1712; *State v. Robertson* (1993), 90 Ohio App.3d 715, 719, 630 N.E.2d 422, 425.

> sought to be protected from racial discrimination by the requirement that challenging counsel must disclose to the Court his reasons for the exercise of a peremptory challenge of a black juror. The Court is unable to conjure up a reason why one of Asian background would be predisposed toward either of the predominant races of the United States. Further, Ms. Balasubramaniam has some orientation related to defendant's operation through her husband, a close friend, and a TV program.

The United States Supreme Court's holding in *Batson v. Kentucky* has been extended to:

> recognize[ ] that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. *See Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L.Ed. 2d 660 (1991); *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

J.E.B. v. Alabama ex rel. T.B. (1994), ___ U.S. ___, ___, 114 S. Ct. 1419, 1421.

The United States Supreme Court recently explained

the proper procedure for resolving a timely claim of racial discrimination in selection of the jury as follows:

> [u]nder our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991) (plurality opinion); *id.* at 375 (O'Connor, J., concurring in judgment); *Batson, supra*, at 96-98.

Purkett v. Elem (1995), ___ U.S. ___, ___, 115 S. Ct. 1769, 1770-1771.

Litigants are entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury-selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia* (1953), 345 U.S. 559, 562, 73 S. Ct. 891, 892. Where, as here, however, the trial court has chosen to accept the rationale for the exercise of peremptory challenges, we will not disturb that ruling absent a determination that it was clearly erroneous. *Hernandez v. New York* (1991), 500 U.S. ___, ___, 111 S. Ct. 1859, 1871, 114 L. Ed. 2d 395, 412; *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, ___, *certiorari denied* (1992), ___, U.S. ___,

113 S. Ct. 279.

We have reviewed the analysis undertaken by the trial court on the peremptory challenges. While the trial court's clear intention was fairness to the parties, it misunderstood the purpose of and the inferences permitted by the *Batson* line of cases.

Despite our concerns, in light of the valid, race-neutral reasons articulated to defend the use of peremptory challenges by the appellees, and in light of Hicks's failure to make a timely objection to the challenge of prospective juror Balasubramaniam, we cannot conclude that the trial court's decision to permit the challenges was clearly erroneous.

Hicks finally contends that she overhead an attorney for appellee NLO, Inc., remark, while leaving the men's room in the courthouse, that at least the entire jury was not black. The trial court conducted an inquiry into the matter. The attorney denied making the remark. As the alleged remark was made outside the hearing of the jury, the court concluded that if it was made at all, the comment, though regrettable, had no effect on the jury. We will not disturb the court's conclusion. The first assignment of error is overruled.

In her second assignment of error, Hicks contends the trial court erred in not declaring a mistrial or in not granting a new trial when, contrary to a stipulation and without an evidentiary foundation in the record, one of appellee' medical experts improperly suggested that Larry Hicks's "purported use of alcohol *** may have been a factor" in his death.

We agree that the expert's comments, elicited on cross-examination by Hicks's counsel, were improper, in light of stipulations and agreements entered into before trial. However, we are persuaded that the trial court's limited

curative instruction, given at Hicks's behest, was sufficient to guard against any undue prejudice to her. As a reviewing court, we must generally presume that the jury obeyed the trial court's curative instruction. *State v. DePew* (1988), 38 Ohio St.3d 275, 284, 528 N.E.2d 542, 553.

Moreover, the record does not reflect a timely motion for mistrial based on references to Larry Hicks's alcohol use. Therefore, the failure to grant a mistrial cannot now be assigned as error. The second assignment of error is overruled.

In her third assignment of error, Hicks contends that the trial court erred by refusing the instruct the jury on the issue of whether the hypertension from which Larry Hicks suffered, a pre-existing medical condition, was accelerated or aggravated[2] by his industrial exposure to black oxide on May 8, 1985. She argues that evidence, adduced from her medical expert, Dr. Cohen, was sufficient to support her proposed jury instruction, as the doctor testified that Larry Hicks's death was accelerated by the black-oxide exposure. We find this assignment of error is not well taken.

In *Oswald v. Connor* (1985), 16 Ohio St.3d 38, 476 N.E.2d 658, a zoo employee with pre-existing chronic coronary artery disease contracted an occupational disease, avian tuberculosis. The occupational disease accelerated the course of the coronary disease. The cause of the employee's death was coronary disease, the pre-existing condition. In the syllabus paragraph, the supreme court identified the legal

---

[2] All parties agree, and we do not dispute, that under the facts of this case the legal concepts of "acceleration" and "aggravation" are synonymous.

requirements necessary for the surviving spouse to participate in the state fund under the doctrine of acceleration:

> Under the Workers' Compensation Act, death from a pre-existing cause and accelerated by an occupational disease contracted in the course of and arising out of the scope of employment, is compensable where the death is accelerated by a substantial period of time as a direct and proximate result of the occupational disease. (*McKee v. Electric Auto-Lite Co.* (1958), 168 Ohio St. 77 [5 O.O.2d 345], approved and extended.)

See, also, *Swanton v. Stringer* (1975), 42 Ohio St.2d 356, 328 N.E.2d 794 (pre-existing condition accelerated by occupational injury, not occupational disease); *Schell v. Globe Trucking, Inc.*, (1990), 48 Ohio St.3d 1, 548 N.E.2d 920 (pre-existing, nonwork-related cervical and lumbar stenosis aggravated by work-related motor vehicle accident); *Kehler v. Mayfield* (1990), 66 Ohio App.3d 59, 583 N.E.2d 418 (pre-existing chronic obstructive pulmonary disease aggravated by toxic chemical inhalation).

Thus, for the death of Larry Hicks to be compensable under a theory of acceleration, his spouse would have to demonstrate that he died from a pre-existing medical condition, and that his exposure to black oxide, an occupational injury, directly and proximately accelerated that death.

In Ohio, the general standard governing the trial court's duty to instruct the jury in a civil action is set forth in *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482

N.E.2d 583, 585, which holds that the jury must be given "a plain, distinct and unambiguous statement of the law as applicable to the case" in the context of the evidence adduced by the parties. A jury instruction should not raise matters not supported by the evidence. *See, e.g., Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135; *Tyrrell v. Investment Assoc., Inc.* (1984), 16 Ohio App.3d 47, 50, 474 N.E.2d 621, 625.

Following extensive argument by all parties, the court ultimately refused to give the jury the following proposed instructions:

> Aggravation
>
> Injury also includes the aggravation of a pre-existing condition. Aggravation means that a physical condition, already existing, is made worse. A plaintiff who has proven that there has been a work-related aggravation of a pre-existing condition is entitled to benefits. A plaintiff is not required to prove that the aggravation was substantial.

Plaintiff's Proposed Jury Instructions, t.d. 84.

> Employers take their employees as they find them and assume the risk of having an employee's pre-existing condition aggravated by some injury which would not hurt or bother a perfectly healthy person. It is not necessary for the claimant to prove that the aggravation is substantial in order to participate in the

Workers' Compensation fund.

Plaintiff's Second Supplemental Proposed Jury Instructions, t.d. 119.

Acceleration

> Under the Workers' Compensation Act death from a pre-existing cause is compensable when it is accelerated by an occupational injury contracted in the course of an arising out of an employee's work, and accelerated by a substantial amount of time. Therefore, you may find that Diane Hicks has the right to participate in the State Fund even if you find that Larry Hicks died of a pre-existing cause.

Plaintiff's Supplemental Proposed Jury Instructions, t.d. 114.

> If Larry Hicks's death was due to a pre-existing condition, but was accelerated by a substantial period of time by the injury, the death is the direct-proximate result of the injury.

Plaintiff's Second Supplemental Proposed Jury Instructions, t.d. 119.

All the contemplated instructions presuppose that evidence was adduced at trial from which the jury could infer that Larry Hicks died of hypertension, the primary pre-existing condition identified by appellant's medical experts.

Hicks contends that factual predicate was created by

the testimony of Dr. Cohen. On direct examination, Dr. Cohen stated that Larry Hicks's hypertension would have shortened his life by about ten years if left untreated, and had the May 8, 1985, accident not occurred. The questioning proceeded:

> Q. So, in your opinion, was Larry Hicks's death substantially accelerated by the injury that occurred at Fernald?
> A. Yes, it was.

The next question, however, reveals Dr. Cohen's opinion as to what medical condition was accelerated.

> Q. In your opinion, again, to a reasonable degree of medical certainty, was Larry Hicks's *myocarditis* related to his employment at Fernald?
> A. I believe it was.

T.p. 836-837 (emphasis added). Hicks asserts this testimony shows that Larry Hicks's death, by whatever cause, was accelerated, and therefore that she was entitled to the proposed instructions. Appellant's Amended Brief at 21.

Nowhere in his testimony, however, does Dr. Cohen state that Larry Hicks's hypertension was the cause of death; there is no testimony that hypertension or any other underlying condition was accelerated by his exposure to black oxide. Dr. Cohen's testimony is consistent with Hicks's primary theory of recovery that the exposure to black oxide directly and proximately caused the mycarditis to which Larry Hicks succumbed. Nonetheless, it was Hicks's burden to

produce medical evidence that work-related radiation exposure accelerated his hypertension. There is no testimony of that. The third assignment of error is overruled.

Appellees raise a sole assignment of error claiming the trial court erred by failing to grant their motion for a directed verdict at the close of the appellant's case on the basis that the evidence presented was insufficient to permit the jury to find a causal link between the May 8, 1985, accident and the mycarditis-caused death of Larry Hicks. We address this claim even though a ruling on its merits is not mandated by R.C. 2505.22 in view of our rejection of the assignments of error advanced by Hicks.

A directed verdict should only be granted where the trial court, without weighing the evidence or the credibility of the witnesses and after construing the evidence most strongly in favor of the non-moving party, determines reasonable minds could come to but one conclusion on the evidence submitted and that conclusion is adverse to such party. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 423 N.E.2d 467. This requires the court to determine only whether there exists any evidence of substantial probative value in support of the non-moving party's claim. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69, 430 N.E.2d 935, 938. If there is evidence which, if believed, would permit reasonable minds to come to different conclusion, the issue must be submitted to the jury.

We overrule appellees' assignment of error as there as amble evidence of substantial probative value adduced at trial from the testimony of Drs. Cohen, Hackworth, and Egilman, and others, which, if believed, would permit reasonable minds to conclude that exposure to the black oxide caused Larry Hicks's death.

Therefore, having overruled each assignment of error raised, we affirm the entry of judgment below.

DOAN, J., CONCURS.

HILDEBRANDT, J., CONCURS IN PART AND DISSENTS IN PART.

HILDEBRANDT, J., CONCURRING IN PART AND DISSENTING IN PART.

I concur in the disposition of the appellant's assignments of error. However, after reviewing the evidence that the jury had before it, I am deeply concerned as to how the jury reached the conclusion it did based upon such evidence. I, therefore, dissent from affirming the trial court's judgment at this time.

In my opinion, had the appellant advanced an assignment of error challenge the propriety of the jury's verdict as being against the manifest weight of the evidence, I would have concluded that this case is one in which such verdict fails to meet the standard set forth in *C.E. Morris Co. v. Foley Const. Co., supra.* Furthermore, while I acknowledge the admonition set forth in App.R. 12(A)(1)(b), I am also cognizant that, pursuant to such admonition, an appellate court, in its discretion, may contemplate an error which was neither briefed nor otherwise raised by either party. *Hungler v. City of Cincinnati* (1986), 25 Ohio St.3d 338, 496 N.E.2d 912. That discretion is limited by requiring the reviewing court to provide the parties with an opportunity to brief the error, *C. Miller Chevrolet v. City of Willoughby Hills*, (1974), 38 Ohio St.2d 298, 313 N.E.2d 400, overruled in part by *Hungler v. City of Cincinnati, supra*, and by requiring that there be a sufficient basis in the record before it for the court to decide the error. *Hungler v. City of*

Cincinnati, supra.

I believe this case is one in which this court should have exercised its discretion and considered whether the judgment *sub judice* was against the manifest weight of the evidence following an opportunity for the parties to brief that question. I, therefore, respectfully dissent from the affirmance of the judgment below in the absence of an extra step in our appellate review.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX C

ENTERED
January 7, 1994
IMAGE 80

DIANE HICKS, ET AL.,	:	**CASE NUMBER**
Plaintiffs,	:	**A8910895**
v.	:	
NLO, INC., ET AL.,	:	**JUDGE WILLIAM**
Defendants.	:	**T. GILLIE**

DECISION ON MOTION FOR A NEW TRIAL

Plaintiff bases its motion for a new trial on five elements.

1. RACIALLY DISCRIMINATORY JURY SELECTION

Every effort was made to select a fair and impartial jury. Whatever may have been in the minds of counsel for either party, the Court was not indulging in an effort to impanel a racially imbalanced jury.

Cynthia-Hazeley, African-American, was an acquaintance of Plaintiff and had heard Plaintiff explain the problem which is the subject of this lawsuit on a TV program.

Virginia Elahee is the sister of a man who worked at the Fernald facility and he was potentially one to be a party to a class action against Defendant or in a group potentially

to benefit from such an action.

Donna Adams, aside from her want of normal secondary education, was, in the Court's opinion, not capable of following the path of evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom.

Usha Balasubramaniam, although swarthy of complexion, is not of the minority sought to be protected from racial discrimination by the requirement that challenging counsel must disclose to the Court his reasons for the exercise of a peremptory challenge of a black juror. The Court is unable to conjure up a reason why one of Asian background would be predisposed toward either of the predominant races of the United States. Further, Ms. Balasubramaniam had some orientation related to Defendant's operation through her husband, a close friend, and a TV program.

With a roomful of prospective jurors, the Court found no reason to incur a risk of any type. At some point, the system is compelled to rely upon the discretion of the trial court.

2. ADMISSION AND EXCLUSION OF EVIDENCE

The rulings made during trial as to admission and exclusion of evidence were vigorously and ably argued on both sides and decided by the Court. Nothing said or done since the trial upon which grounds for change can be found.

3. MENTION OF ALCOHOL USE BY PLAINTIFF'S DECEDENT

This was one reference casually made by one witness without knowledge of the stipulation. In context, it was not used as a contributing factor to Mr. Hicks' death, nor critically of his character. The Court offered to give the jury an instruction on the point, but Plaintiffs' counsel correctly, in the Court's view, declined on the premise that a discussion of the slip would only emphasize its importance and memorability. It was not, in the Court's opinion, a factor leading to prejudice against Plaintiff, certainly not the end of granting a mistrial, the only remaining alternative.

ENTERED
January 7, 1994
IMAGE 81

4. FAILURE OF THE COURT TO GIVE PLAINTIFFS' PROPOSED INSTRUCTIONS ON ACCELERATION OF A PRE-EXISTING CONDITION, AGGRAVATION OF A PRE-EXISTING CONDITION, AND ON CAUSAL CONNECTION

Throughout the pre-trial, trial and argument on this motion, (page 5 of Plaintiffs' memorandum in support), Plaintiff has asserted that the Decedent Lawrence Hicks was a relatively healthy young man who enjoyed playing with his children, playing basketball, and lifting weights for exercise. Instructions on acceleration or aggravation of a pre-existing condition not presented by the evidence would be error.

The Court did provide an instruction on causal connection. It differed from that proposed by Plaintiff but was a correct statement of the law int he Court's opinion.

5. THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

It is the opinion of the Court that the jury could have very reasonably found for Plaintiff or Defendant. Any passion or prejudice would have been expressed for the young mother and gracious lady Plaintiff obviously is in an at least equal measure of feeling against her by reason of racial prejudice. In the absence of evidence the jury rendered its decision on factors other than the facts and law provided, the Court must accept it as valid.

In consideration of all of the foregoing, the Court denies Plaintiffs' motion for a new trial. Exceptions reserved.

ENTERED
January 7, 1994

/s/
WILLIAM T. GILLE, JUDGE

APPEARANCES:

Louise M. Roselle
Allen P. Grunes
Attorneys for Plaintiff

Case Number A8910895

Walter E. Haggerty
Attorney for Defendant NLO, Inc.

Dianna K. Bond
Attorney for Industrial Commission

ENTERED
January 7, 1994
IMAGE 83

APPENDIX D

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

APPENDIX E

OHIO REVISED CODE § 2313.42

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to section 2313.06 of the Revised Code. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to section 2313.06 of the Revised Code or otherwise as having a valid and current driver's or commercial driver's license.

The following are good causes for challenge to any person called as a juror:

(A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;

(B) That he has an interest in the cause;

(C) That he has an action pending between him and either party;

(D) That he formerly was a juror in the same cause;

(E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

(F) That he is subpoenaed in good faith as a witness in the cause;

(G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

(H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the proceeding twelve months;

(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

APPENDIX F

VENIRE MEMBERS THROUGHOUT JURY SELECTION

[AFRICAN AMERICANS IN **BOLD ITALICS**]

Venire at the beginning of the first day of voir dire	Venire at the end of the first day of voir dire	Venire at the beginning of the second day of voir dire	Venire at the end of second day of voir dire
Clark	***Clark***	***Elahee***	Chapman
Hazely	***Elahee***	Totlis	***Croft***
Hils	Totlis	***Adams***	***Graham***
Cook	***Adams***	Chapman	Berting { **FINAL**
Elahee	Chapman	Winter	Wismer { **EIGHT**
Totlis	Winter	***Croft***	Hughes { **JURORS**
Adams	***Croft***	Yorgovan	Jordan
Usher	Yorgovan	***Graham***	Williams
Chapman	***Graham***	Berting	Weber { **TWO**
Winter	Berting	Wismer	Taphorn { **ALTS.**
Croft	Wismer	Hughes	
Yorgovan	Hughes	French	
Graham	French	Balasubram.	
Berting	Balasubram.	Jordan	
Wismer	Jordan	Williams	Bishop
Hughes	Williams	Weber	Hinton
Hyde	Weber	Coyne	Frees
French	Coyne	Corbett	Feller
Balasubram.	Corbett	Taphorn	Bellamy

VENIRE MEMBERS THROUGHOUT JURY SELECTION
-continued-

[AFRICAN AMERICANS IN **BOLD ITALICS**]

Venire at the beginning of the first day of voir dire	Venire at the end of the first day of voir dire	Venire at the beginning of the second day of voir dire	Venire at the end of second day of voir dire
Jordan	Taphorn	Batra	
Williams	Batra	Huber	
Dozier	Huber	Crow	
Weber	Crow	Bishop	
Coyne	Bishop	Hinton	
Corbett	Hinton	Frees	
Taphorn	Frees	Feller	
Batra	Feller	Bellamy	
Huber	Bellamy		
Crow			
Bishop			
Hinton			
Frees			
Feller			
Bellamy			

Supreme Court, U.S.
FILED
AUG 1 1997
CLERK

No. 97-34

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1997

DIANE HICKS,
Petitioner,

v.

WESTINGHOUSE MATERIALS COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF OF RESPONDENT NLO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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32 pp

LIST OF PARTIES PURSUANT TO RULES 14.1(b) and 29.6

The parties to this action are, Diane Hicks, Petitioner, and NLO, Inc. *sub nom.* Westinghouse Materials Company, the Industrial Commission of Ohio, and the Bureau of Workers' Compensation, Respondents.

Respondent NLO, Inc. ("NLO") has no nonwholly owned subsidiaries. NLO's parent company is NL Industries, Inc., which is a publicly traded company, whose two major shareholders are Valhi, Inc. and Tremont Corp., both publicly traded companies.

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STATUTES

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I. STATEMENT OF THE CASE

A. Factual Background & Procedural Posture

Lawrence W. Hicks, an employee of Respondent NLO, died May 20, 1985 at Bethesda Oak Hospital, Cincinnati, Ohio. The local Coroner determined the cause of death to be acute interstitial myocarditis--inflammation of the heart. Death Certificate, Plaintiff's Ex. 37, admitted at Trial Transcript ("T.") p. 1193. His widow, Petitioner Diana T. Hicks, asserted a claim for workers' compensation benefits, alleging that the death was caused by the effects of an accident at work on May 8, 1985, in which he and a co-worker, for 10-15 seconds, were below a dark puff of "smoke" emitted above their heads by a vacuum cleaner they were using. T.p. 719-20, 738-39, 748-49.

When, in 1989, the Industrial Commission of Ohio denied Petitioner's 1987 claim for death benefits relating to the May, 1985 death of Lawrence W. Hicks, Mrs. Hicks appealed to the Court of Common Pleas of Hamilton County, Ohio. After a two week trial, the jury concurred with the Industrial Commission and rendered a verdict for Respondents. Verdict, T.d. 120. Judgment was entered thereon in April, 1993, Judgment Entry, T.d. 123, Petitioner's Motion for a New Trial was overruled in January, 1994, Decision on Motion for New Trial, T.d. 133, Petitioner's Appendix at A-2, and Petitioner appealed to the Court of Appeals, First Appellate District, Hamilton County, Ohio.

Petitioner appealed the decision of the trial court, raising, among other issues, an appeal of the trial court's decision rejecting Petitioner's Batson challenge to the peremptory strike of prospective juror Donna Adams. In addressing the Batson juror selection issue raised in this appeal, the Ohio Court of Appeals concluded that "in light

of the valid, race-neutral reasons articulated to defend the use of peremptory challenges by the appellees, and in light of Hick's failure to make a timely objection to the challenge of prospective juror Balasubramaniam, we cannot conclude that the trial court's decision to permit the challenge was clearly erroneous." Petitioner's Appendix at p. A25. Petitioner then sought reconsideration of the decision of the Court of Appeals, but her application was denied.

On November 13, 1995, Petitioner sought appeal of this decision to the Ohio Supreme Court, with the case being argued before the Ohio Supreme Court on November 12, 1996. In its opinion, issued April 2, 1997, the court affirmed the trial court stating:

> Our view of the law and record compels us to conclude that the trial judge properly applied the standard as articulated in Batson. Accordingly, we cannot say that the decision of the trial court to grant appellees' peremptory strike was clearly erroneous. We therefore affirm the judgment of the court of appeals and hold that the peremptory challenge exercised by appellees did not violate constitutional law.

Petitioner's Appendix at A6. The court further concluded that the trial court had not "misunderstood" Batson, stating that "[t]he trial court fulfilled its basic constitutional duty; appellees' peremptory strike did not unconstitutionally compromise the integrity of the jury selection process in any way." Id. at A14.

B. Jury Selection Process.

Jury voir dire was conducted on a two-step basis: first individually, during which knowledge of and connection to the NLO-managed facility at Fernald and pending class actions relating to it were explored, and then as a group, during which the more usual subjects of voir dire were covered. Prospective jurors were excused at both levels of the process by both parties. See, e.g., T.p. 426, 436, 539-43, 583. Both parties made use of challenges for cause as well as peremptory challenges. See, e.g., T.p. 426, 436, 575, 583.

At the beginning of the voir dire process, there were six African-American venirepersons out of a total of thirty-four, or 16.6 percent of the total venire.[1] Out of these six African-American venirepersons, two, Jurors Croft and Graham, ultimately served on the jury which rendered a verdict in favor of Respondents. Therefore, while the original venire was 16.6 percent African-American, the makeup of the final jury was 25 percent African-American. Of the four African-Americans who did not serve on the final jury, one failed to return for the second day of voir dire, two were excused by the Court for cause, and one was excused peremptorily by the Respondents. It is Respondent's exercise of a peremptory challenge against

---

[1]Petitioner's Appendix at A-2. Petitioner offers a chart at Appendix F to her Petition which she claims supports her argument concerning racial discrimination in the exercise of a peremptory challenge to Ms. Adams. This chart is not part of the record of the proceedings below and nothing in the record supports the validity of this chart. In fact, apart from Ms. Adams (peremptorily excused) and Ms. Elahee (excused for cause), there is no clear indication in the record of this case as to the race of any person in the venire. Therefore, the Court may not and should not consider this chart in its deliberations.

prospective juror Donna Adams which is the sole issue before the Court on this appeal.

During voir dire, Petitioner's counsel objected to NLO's peremptory challenge to Ms. Adams pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), alleging that the sole motivation for the use of a peremptory strike to excuse Ms. Adams from the venire was Respondent's discriminatory bias against African-American jurors. T.p. 577. Because Petitioner mischaracterizes the process undertaken by the trial court in responding to her objection to the exercise of a peremptory challenge against Ms. Adams, it is necessary to examine this process in detail. Petitioner would have the Court believe that the trial court paid no heed to her objection or to her arguments in support of the objection. In fact, even assuming the trial court could have articulated its understanding of the Batson inquiry in a more artful fashion, the trial court listened to the arguments presented by counsel for Petitioner and determined that she had not sustained her burden of showing invidious racial discrimination as required under Batson.[2]

When Petitioner raised an objection and demanded an explanation for the exercise of a peremptory challenge against Ms. Adams, the trial court concluded that an explanation outlining the reasons for the peremptory challenge was in order pursuant to Batson. T.p. 577. Following this determination by the trial court, NLO's counsel articulated those reasons on the record as required by the second step of the analysis under Batson, stating in part:

---

[2]The Ohio Supreme Court stated that "[w]hile less than artful, the trial court conducted a proper Batson inquiry." Petitioner's Appendix at A14.

> Miss Adams is -- Miss Adams is an unemployed women who has a very limited educational background. This is a case that involves some technical issues and medical testimony.
>
> We're concerned by the answers that we received yesterday that those issues require a certain level of sophistication that may not be present in this particular juror. And that's why we are asking peremptorily that she be taken off the panel. And this is directed -- this is not a racial issue and it has nothing to do with race. It is an issue that deals with what we think to be her duty to function as a juror in this case.

T.p. 577.

Two counsel for Petitioner then challenged the race neutral explanation offered by counsel for Respondent NLO for the peremptory challenge to Ms. Adams, claiming that Ms. Adams educational and employment history was not sufficiently different from other prospective jurors to support the race neutral explanation being offered. T.p. 578.

In response to the arguments presented by counsel for Petitioner, counsel for Respondent NLO offered a further explanation, stating:

> But we're making a determination based upon what we think is their ability to understand issues, watch their reactions to questions. And it's not just questions that you ask; its the reaction to other questions that are asked and their reactions to that.

T.p. 578-79.

Following this exchange, the trial court considered the arguments presented and raised questions concerning the educational level of Ms. Adams as compared to the educational level of other prospective jurors, stating:

> Let me make it clear that if there are quite a number whose educational level from the questionnaires shows the same level of education, then this isn't as persuasive as it would be if there were only two or three or in the category of dropping out of school in the tenth grade or whatever she did.

T.p. 579. After raising this concern, the trial court allowed counsel for Petitioner the opportunity to further argue that other prospective jurors on the panel had educational levels similar to Ms. Adams. T.p. 579-82.

During this period of the proceedings, the trial court continued to hear and consider arguments from both counsel for Petitioner and counsel for Respondent NLO on the peremptory challenge to Ms. Adams. T.p. 579-82. After reviewing the juror questionnaires, counsel for Petitioner offered the educational level of Mrs. Bishop, a prospective juror not currently on the panel (and who was never seated), as a point of comparison to the educational level of Ms. Adams. T.p. 581-82. Counsel for Petitioner was unable to point to any prospective juror who was currently on the panel. T.p. 582. Thus, when challenged and asked to produce any evidence supporting their objection to the peremptory challenge to Ms. Adams, Petitioner failed to produce any evidence of racial bias in the juror selection process.

Throughout this process, Petitioner was given a full opportunity to point to circumstances in the proceedings

before the trial court which supported her argument that the exercise of a peremptory challenge against Ms. Adams was racially motivated, so that she could sustain her burden of showing that the explanatory statement offered by counsel for Respondent NLO was merely a pretext for racial discrimination. After hearing the explanation offered by counsel for Respondent NLO, the arguments presented by counsel for Petitioner and after further reviewing the venire, the trial court concluded that Petitioner had failed to sustain her burden under Batson of proving invidious racial discrimination in the peremptory challenge to Ms. Adams. Therefore, as required under Batson, the trial court accepted the explanation for the peremptory challenge offered by counsel for NLO and overruled Petitioner's objection. T.p. 582.

Petitioner again raised the issue of Respondent's exercise of a peremptory strike against Ms. Adams in its Motion for a New Trial. The trial court, after considering the same issues and arguments which Petitioner had raised during the trial, concluded that counsel for Respondent NLO was not motivated by racial animus in using a peremptory challenge to remove Ms. Adams from the venire. In so concluding, the trial court stated:

> Donna Adams, aside from her want of normal secondary education, was, in the Court's opinion, not capable of following the path of the evidence in the case before the Court and was strongly desirous of being elsewhere than in the courtroom.

Decision on Motion for New Trial, Petitioner's Appendix at A35.

In her petition, Petitioner presents the same arguments which have been rejected twice by the trial court,

twice by the Ohio Court of Appeals, and once by the Ohio Supreme Court concerning the exercise of a peremptory challenge to Ms. Adams.

Petitioner does not claim that the trial court was clearly in error in its decision. Petition at pp. 20-22. Petitioner seeks to have this Court perform some form of basic fact finding, a role which this Court has historically not seen as its function. Petitioner asks this Court to ignore the "clearly erroneous" standard, established by this Court and the Ohio Supreme Court as the proper standard to review a lower court's finding of fact under Batson, in favor of some new standard which Petitioner fails to articulate. Petition at pp. 20-22. See, e.g., Hernandez v. New York, 500 U.S. 352, 369 (1991); State v. Hernandez, 89 N.E.2d 1310, 1314 (Ohio), cert. denied, 506 U.S. 898 (1992).

II. REASONS WHY THE PETITION SHOULD NOT BE GRANTED.

A. Petitioner's Petition Presents No Constitutional Issue.

The most basic problem with Petitioner's Questions Presented is that they address no particular *issue* of constitutional import to this Court. While the petition involves constitutional concepts, no issue is resolved by it. The law as to jury selection has been clearly defined in Batson and its progeny. This Court has established the jurisprudence in this area.[3] The responsibilities and duties

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[3]Batson and its progeny operate to insure that peremptory strikes are not employed in the juror selection process in a racially discriminatory fashion. The law developed through these cases does not constitutionally require that a petit jury be composed, in whole or in part, of persons who are members of a particular racial group. Batson, 476 U.S. at 85

of the trial court upon the assertion of a Batson-based challenge are set forth clearly in the existing cases, most recently in Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).[4] Petitioner does not suggest that this Court's plainly articulated law in this area should be somehow modified. Rather, what are at issue in this Petition are disputed issues of fact and an alleged misapplication of a rule of law, neither of which are appropriate issues for review by this Court according to its rules. Rule 10, Rules of the United States Supreme Court. Essentially, Petitioner is attempting to transform a request for a review of a trial court's factual determination into a review of a constitutional question, in an area where there is no constitutional question.

This Court in Batson, and its progeny, held that it is constitutionally impermissible for a litigant, whether civil or criminal, to exclude potential jurors purely on the basis of

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(citing with approval Strauder v. West Virginia, 100 U.S. 303 (1880) overruled on other grounds, Taylor v. Louisiana, 419 U.S. 522 (1975)).

[4]In Purkett, announced May 15, 1995, the Supreme Court reiterated the steps that are to be taken when a peremptory challenge is opposed as being racially motivated. As articulated by the Court, those steps are:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful discrimination.

Purkett, 514 U.S. at __, 115 S. Ct. at 1770-71.

membership in any particular racial group.[5] Such membership obviously does not constitute "cause" for excusing members of the venire, and thus the cases analyzing this issue deal exclusively with the use of peremptory challenges.[6]

The Court's Purkett decision holds: first, that the burden of proving purposeful racial discrimination rests and always remains with the opponent of a strike under Batson, and second, that a race-neutral explanation by the proponent of the strike may be silly and implausible and still satisfy the second step of the Batson analysis, so long as the explanation is facially race-neutral. Purkett, 514 U.S. at ___, 115 S. Ct. at 1770-71. If the proponent of the strike offers a race-neutral explanation for the use of the strike, the party challenging the strike must meet its burden of producing credible competent evidence that the explanation which has

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[5]See Batson, 476 U.S. 79; Hernandez v. New York, 500 U.S. 352; Edmonson v. Leesville Concrete, 500 U.S. 614 (1992); and J.E.B. v. Alabama, ex rel T.B., 511 U.S. 127 (1994). See also State v. Hernandez 589 N.E.2d 1310 (Ohio 1992).

[6]It is also appropriate to note that Petitioner seeks to use challenges for cause by the defense to help demonstrate purposeful discrimination on the part of the defense in the jury selection in this case. Such a claim is simply insupportable. Whether a particular venireman has something in his or her background which, in the view of the trial court, disqualifies that person as a juror in this case is completely beyond the control or influence of any of the parties to the case. Indeed, were this (or any) court to permit use of cause challenges to demonstrate "purposeful discrimination" the result would be paradoxical, since biased veniremen would inevitably be permitted to remain on the jury to avoid the possibility of their dismissal for cause being used as a basis for finding racial animus in some later peremptory challenge. Further, such use of challenges for cause defies logic, since by definition, the cause itself is the motivation to remove the offending venireman, not some potential prejudice by a party for or against any particular race or class.

been offered is merely a pretext for purposeful racial discrimination. Id.

Although Petitioner may disagree with the wisdom of the rulings of this Court in determining the issues involved in a challenge to a peremptory strike allegedly based on racial animus, she cannot argue that the responsibilities of the various parties are ambiguous after the Court's decision in Purkett. This Court has stated that, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Hernandez v. New York, 500 U.S. at 369. Petitioner asks this Court to ignore this standard.

B. The Trial Court Properly Concluded That Petitioner Had Failed To Sustain Her Burden Of Showing That The Exercise Of A Peremptory Strike Against Donna Adams Was Motivated By A Racially Discriminatory Intent.

Batson and its progeny operate to insure that peremptory strikes are not employed in the juror selection process in a racially discriminatory fashion. The law developed through these cases does not require that a petit jury be composed, in whole or in part, of persons who are members of a particular racial group. Batson, 476 U.S. at 85 (citing with approval Strauder v. West Virginia, 100 U.S. 303 (1880), overruled on other grounds, Taylor v. Louisiana, 419 U.S. 522 (1975)). The law does require that the party seeking to peremptorily exclude a particular juror must offer, when a prima facie showing of racial discrimination has been made, a "race-neutral" explanation for the exclusion. Batson, 476 U.S. at 97. In order to

avoid constitutional infirmity, this "race-neutral" explanation need not, however, rise to the level of the explanation required to excuse a prospective juror for cause. Id. See also State v. Hernandez, 589 N.E.2d at 1314-15.

Petitioner, therefore, is not entitled to a jury which necessarily includes even one member of any particular racial group. Rather, Petitioner is entitled to a juror selection process which is free of racially discriminatory bias.

In this case, counsel for Respondent NLO offered a factual and objective explanation for the peremptory challenge to Ms. Adams; one which was specifically related to the trial at hand. It certainly was appropriate for counsel for Respondent NLO to conclude that the education, sophistication and demeanor of a prospective juror were important issues in determining the effectiveness of a juror in a multi-week trial focused on issues related to potential radiation exposure and in which ten experts would testify.

If the proponent of the strike offers a race-neutral explanation for the use of the strike, the party challenging the strike must meet its burden of showing that the explanation which has been offered is merely a pretext for purposeful racial discrimination. Purkett, 514 U.S. at ___, 115 S.Ct. at 1771. The Court clarified in Purkett that it is the opponent of the peremptory strike who always has the burden of proving purposeful racial discrimination; the proponent of the strike need not disprove racial discrimination. Id. As the Court stated, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Id.

In this case, the trial court apparently concluded that Petitioners had raised a sufficient inference to meet their burden of a prima facie showing of discrimination under the first step of the Batson analysis, stating that an explanation under the second step of Batson was in order. T.p. at 577.

Of course, it is important to note that the prima facie showing required under step one of Batson is minimal. See Batson, 476 U.S. at 96-98; Hernandez v. New York, 500 U.S. at 358.

Once the court finds that the party objecting to the strike has made the requisite prima facie showing of racial discrimination, then the court is to require the party exercising the peremptory challenge to provide a race-neutral explanation for the removal of the particular juror in question from the jury. Batson, 476 U.S. at 96-98. However, where the attorney exercising the peremptory strike provides an explanation for the peremptory challenge prior to the trial court's actual finding that a prima facie case of discrimination has been shown, the reviewing court may assume that the trial court implicitly found a prima facie case of discrimination, even where there was no formal finding with regard to step one. State v. Hernandez, 589 N.E.2d at 1314.

The explanation offered to support the exercise of the peremptory challenge must be race neutral, reasonably specific, and related to the issues to be addressed in the pending trial. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. See also Batson, 476 U.S. at 97. As stated by the Supreme Court in Purkett, any race-neutral explanation will be sufficient to rebut a prima facie case of discrimination at this stage in the inquiry. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. A trial court must accept the neutral explanation unless the court concludes under step three of the analysis that the peremptory challenge was in fact racially motivated. Id.

In this case, counsel for Respondent NLO offered a lengthy and detailed race-neutral explanation for the exercise of a peremptory strike against Ms. Adams.[7] T.p. 577-79.

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[7]See discussion supra at pp. 3-7.

Clearly, counsel for Respondent NLO offered an explanation which was race neutral, specific, and related to the issues to be litigated in the pending trial as required. Purkett, 514 U.S. at ____, 115 S. Ct. at 1774. The explanation offered by counsel for Respondent NLO was appropriately accepted by the trial court as sufficient to rebut any prima facie inference of racial motivation at the second step of the Batson inquiry.

As previously stated, a trial court must accept the race-neutral explanation offered by the proponent of the peremptory strike unless the court concludes under step three of the analysis that the peremptory challenge was in fact racially motivated. Id. Under step three of the Batson inquiry, the trial court must determine whether or not the opponent of the peremptory strike, in this case the Petitioner, has proven purposeful racial discrimination. Batson, 476 U.S. at 98. As the Supreme Court explains in Batson, at this point "the trial judges's findings . . . largely will turn on evaluation of [the striking attorney's] credibility. . . ." Id. at 98 n.21.[8] Thus, on more than one occasion, this Court has established that the sincerity and credibility of the

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[8]As stated by the Supreme Court in Hernandez v. New York:

> In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

500 U.S. at 365.

striking attorney as a decisive factor to be considered by the trial court under step three of a Batson challenge.

The trial court followed the law established by this Court. The record in this case leaves no doubt that the trial judge, both during the trial and in his decision on Petitioner's Motion for New Trial, engaged in an analysis of the striking attorney's credibility, sincerity and motivations, weighed the relevant facts and circumstances and concluded that the Petitioner had failed to show that the proponent of the strike was motivated by racial animus in exercising a peremptory challenge to Ms. Adams. Counsel for Petitioner was given the opportunity to fully present her arguments in support of her objection to the exercise of a peremptory challenge against Ms. Adams. The arguments presented to the trial court at this point were essentially the same arguments which Petitioner has presented to this Court in her Petition. After listening to these arguments, the responses of counsel for Respondent NLO, observing the demeanor of the juror, and observing the demeanor and sincerity of counsel for Respondent NLO, the trial court concluded that the explanation offered was credible and not the product of racial motivation.[9]

In this case, the trial court gave both parties a full opportunity to be heard on the issue, allowed Petitioner a

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[9]Petitioner cites the cases of State v. Robertson, 630 N.E.2d 422 (Ohio Ct. App. 1993) and State v. Tuck, 610 N.E.2d 591 (Ohio Ct. App. 1992) in support of her argument that the trial court failed to understand or to follow a proper analysis as required by Batson. However, unlike the case before the Court, in both Robertson and Tuck, the trial court failed to provide the party objecting to the strike a full opportunity to sustain their burden of showing that the motivation behind the exercise of the peremptory challenge at issue was racial discrimination. Robertson, 630 N.E.2d at 430; Tuck, 610 N.E.2d at 593-94. These same arguments were presented to the court below and rejected.

full opportunity to show that the race neutral explanation offered was merely a pretext for racial discrimination, and concluded that the statement was not pretextual. Therefore, the Court should conclude that the decision of the trial court was not clearly erroneous and affirm the trial court's decision.

C. An Appellate Court, In Reviewing A Trial Court's Determination That A Particular Peremptory Challenge Is Not Racially Motivated Under Batson Should Not Disturb The Decision Of The Trial Court Absent Clear Error.

In the case at bar, Petitioner seeks to have this Court adopt a proposition of law which would essentially hold that a court of appeals may not review a record on appeal to evaluate the sufficiency or credibility of the race-neutral explanation offered by the proponent of the strike where, the trial court has arguably not articulated its analysis artfully. She asserts, at least impliedly, that such an evaluation by the court of appeals is somehow constitutionally impermissible.[10]

While the Ohio Supreme Court held that no error occurred in the trial court's rejection of Petitioner's Batson

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[10]In both Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995) and Montiel v. Los Angeles, 2 F.3d 335 (9th Cir. 1993), relied upon by Petitioner, the appellate court was forced to remand the case to the trial court because the trial court had conducted no Batson inquiry, including allowing the party objecting to the peremptory challenge to make its prima facie showing of discrimination under step one of the Batson analysis. There was, therefore, no record of a Batson inquiry for the appellate court to review.

objection, Petitioner asks this Court to reject its well settled "clearly erroneous" standard in favor of a standard whereby reversal is mandatory if a trial court does not articulate its Batson analysis in a particular manner. This Court specifically rejected such a standard in Batson. 476 U.S. at 99 (specifically declining "to formulate particular procedures to be followed.").[11]

Petitioner proposes a rule by which the court of appeals' role on Batson issues would be reduced to that of a mere rubber stamp--"reversed" if any lack of clarity or error is found; "affirmed" if not. Such a restricted role for the court of appeals has never been part of the law of Ohio, or of any jurisdiction in modern Anglo-American jurisprudence. Instead, courts of appeals have always been empowered to examine the record more deeply and are not limited to simply locating errors.

Seven members of the United States Supreme Court in Purkett allowed the Court of Appeals to perform precisely the evaluation which Petitioner here claims is not permitted. 514 U.S. 765, 115 S. Ct. 1769. Further, the two members of the Court who dissented from the Purkett ruling specifically stated their approval of the consideration of the Batson analysis by the Court of Appeals based on the record before it. Id. (Stevens, J. and Breyer, J., dissenting). Thus, Purkett stands in precise contravention to Petitioner's position asserted in her Petition.

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[11]An appellate court reviewing a finding that no discriminatory intent was present may reverse such a finding only where "the trial court's decision was clearly erroneous, that is, 'so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process, * * * or equal protection.'" State v. Belcher, 623 N.E.2d 583, 587 (Ohio Ct. App. 1993) (quoting Hernandez v. New York, 500 U.S. at 368).

D. No Evidence Exists Supporting The Contention That Respondent Employed A "Double Standard" In Their Dealings With Members Of The Venire In A Manner Demonstrating Racial Animus.

Petitioner argues that counsel for Respondent NLO applied a "double standard" to African-American and Caucasian venirepersons throughout the jury selection process. Once again Petitioner misrepresents and mischaracterizes the record of the proceedings below.[12]

With regard to her allegation that counsel for Respondent NLO employed a "double standard" concerning venirepersons' employment status and level of education, Petitioner claims that even while claiming to strike Ms. Adams for having "very limited" education and being "unemployed," defense counsel fought to retain white jurors with fewer years of schooling than Juror Adams. Petition at p. 8-9. As evidence of this, Petitioner claims that

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[12]Petitioner also notes, once again, her allegation of a certain statement which was alleged to have been made by one defense counsel, who neither conducted voir dire nor actively participated in trial, upon exiting the men's room in the courthouse shortly after the jury was sworn. She claims that this, too, shows purposeful discrimination on the part of the defense in this case. However, as an officer of the court, the attorney in question denied ever making such a statement. T.p. at 600. Petitioner fails to note, however, that she neither offered nor proffered any evidence supporting her claim that the statement was made, nor did she testify under oath that such a statement was made nor did her counsel as an officer of the court proffer evidence. Therefore, she denied to the Court any evidence, if any existed, upon which to do other than it did, which was to proceed with the trial.

prospective jurors Chapman, Hughes, and Berting, three of the six eventual Caucasian sitting jurors, had no more than high school education. Petition at p. 8. In fact, based on the Juror Questionnaires, all three of these jurors had graduated from high school, in contrast with Ms. Adams, who did not graduate from high school. Petitioner also cites defense counsel's decision not to challenge alternate juror Taphorn as evidence of this "double standard," even though, in contrast to Ms. Adams, Mrs. Taphorn, who was an alternate juror, had significant life and work experience. Petition at 8-9. Additionally, at the time of the consideration of Ms. Taphorn, Respondent did not have any peremptory challenges remaining.

However, Petitioner fails to mention that in stark contrast to Ms. Adams, Jurors Chapman, Jordan, Hughes, Berting, and alternate juror Taphorn were all either employed or possessed significant employment experience at the time of the trial, as clearly indicated on the Juror Questionnaires. Surely the Petitioner would not deny that work experience and life experience enable individuals, especially those with limited formal educational backgrounds, to enhance their analytical and cognitive skills as well as their understanding of the world around them. As such, Respondent's counsel made a valid, race-neutral distinction in choosing to exercise a peremptory challenge against Ms. Adams, a twenty-eight year old, unemployed individual with limited education and choosing not to use its last remaining challenge to exclude Chapman, Jordan, Hughes, Berting, or Taphorn, individuals who had more formal education, had completed high school and also had employment experience working outside the home.

To further support her argument, Petitioner also refers to the fact that counsel for Respondent NLO opposed Petitioner's motion to excuse for cause Caucasian venireperson Usher and that counsel for Respondent NLO

passed for cause on Caucasian venireperson Bishop and then opposed Petitioner's motion to excuse Bishop for cause. Petition at pp. 8-9. In setting forth this argument, Petitioner once again exhibits a lack of understanding about the crucial difference between strikes for "cause" and peremptory strikes. See Berk v. Matthews, 559 N.E.2d 1301, 1309 (Ohio 1990). See also Sowers v. Middletown Hosp., 626 N.E.2d 968, 976-77 (Ohio Ct. App. 1993); Carpenter v. Bonniway Leasing, Inc., 627 N.E.2d 1030, 1031-32 (Ohio Ct. App. 1993).[13]

Additionally, Petitioner fails to mention that Bishop was employed as a factory worker at the time of the trial and that Usher had worked as an electronics technician before he retired. This differentiates them from Adams, thus providing a race neutral distinction which renders Petitioner's "double standard" argument insupportable.

In her allegation that counsel for Respondent NLO employed a "double standard" with respect to employment status by not challenging for cause or using a peremptory challenge to strike prospective jurors Hughes, Wismer, and Taphorn, Petitioner simply misunderstands the significance of employment status. The distinction to be made is between those individuals who have never worked and those who have some work experience. Whether or not a potential juror was working at the time of the trial is not, as the

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[13]The decision to remove a juror for cause is in the discretion of the trial court, while the use of peremptory challenges is within the discretion of the parties. Counsel's motions to strike for "cause" and opposition to opposing counsel's motions to strike for cause do not support a claim of racial animus with regard to peremptory challenges. Petitioner also neglects to mention that the stated reason why counsel for Respondent NLO opposed Petitioner's motion to excuse Bishop for cause was because counsel for Respondent NLO did not believe that Bishop's hypertension, a condition also suffered by Mr. Hicks, was a valid reason to exclude Bishop. T.p. at 451.

Petitioner suggests, where the significance lies. Rather, the issue is whether a potential juror has the enhanced level of sophistication that comes from having a history of employment, regardless of whether the juror is actually employed at the very time of the trial.

Further, with regard to the differences between Mrs. Taphorn and Ms. Adams, the trial court examined the specific issue which Petitioner now seeks to argue supports her claim of racial bias. T.p. at 589-593. The trial court examined the specific issues raised by the Petitioner and concluded that there existed objective race neutral distinctions between Ms. Adams and Mrs. Taphorn, as well as other Jurors. The trial court also recognized the difference in the level of alertness between Ms. Adams and Mrs. Taphorn. T.p. at 591.

Petitioner further alleges that counsel for Respondent NLO applied a "double standard" to African-American and Caucasian venirepersons who knew persons involved in the trial, by pointing to the fact that counsel for Respondent NLO opposed excusing prospective jurors Totlis and Winter, two Caucasian venirepersons who claimed to know persons involved in the trial, while they asked the court to excuse Ms. Hazeley, an African-American who knew Ms. Hicks. Petition at 5-6. Petitioner fails to understand the trial court's role in observing the juror's demeanor to determine whether the juror can serve impartially despite his familiarity with an individual involved in the case. Due to Petitioner's failure to recognize the subjective and contemporaneous nature of the trial court's discretion in this area, a close review of the record is once again necessary.

Mr. Totlis indicated on the second day of voir dire that he knew defendants' expert witness, Dr. Eugene Saenger. T.p. 524. Totlis served on a board of trustees with Dr. Saenger and indicated that he thought Dr. Saenger was an "[h]onorable gentleman with integrity, dedicated to

his profession, active in the community" and a "nice guy." T.p. 524. When asked if he thought his familiarity with Dr.Saenger would result in his giving Dr. Saenger more credence than other expert witnesses, Mr. Totlis twice assured the court that he could serve as an objective juror. T.p. 524.

Ms. Winters stated during voir dire by counsel for Petitioner that she believed she recognized Mr. Hawkins, counsel for Respondent NLO, from church and that she was in a Sunday School class with Mrs. Hawkins. T.p. 514. The trial court inquired as to whether Ms. Winters felt she could be impartial and she assured the court that she could. T.p. 516.

Thus, both Mr. Totlis and Ms. Winters clearly stated on the record that their familiarity with individuals involved in the case would not effect their ability to be impartial. T.pp. 515-516. For this reason, Counsel for Respondent NLO opposed excusing Mr. Totlis and Ms. Winters for cause. T.p. 540.

In contrast, Ms. Hazeley worked at the University of Cincinnati where Mrs. Hicks worked, knew Mrs. Hicks from this workplace, and had prior exposure to the claims of Mrs. Hicks through a television program. T.pp. 117-120. While Petitioner contends that the exclusion of Ms. Hazeley is another example of the racial animus which motivated Respondent's counsel throughout the juror selection process, it was hardly unreasonable for the trial court to conclude that because Ms. Hazeley worked at the University of Cincinnati Hospital where Mrs. Hick's worked, knew Mrs. Hick's from this workplace, and had prior exposure to the claims of Mrs. Hicks through a television program, she would be potentially

biased and should be excused. T.pp. 117-120.[14] Counsel for Respondent clearly stated that the reason Ms. Hazeley should be removed from the jury pool was the "emotional connection" and the awareness which she had shown concerning the issues and personalities before the trial court in this case. T.p. 120.

In discussing their allegation that counsel for Respondent NLO employed a "double standard" concerning juror's "levels of sophistication," Petitioner attempts to juxtapose Respondent's concerns about Ms. Adams' lack of sophistication with what they refer to as Respondent's "lenient attitude" toward three Caucasian venirepersons who eventually became sitting jurors--Jurors Chapman, Jordan, and Hughes. Petition at p. 5, 8, 9. In making such an argument, Petitioner ignores the significant differences that exist in the level of sophistication present in a prospective juror who has had limited formal education and has little or no work experience and one who has limited formal education, but who has a work history. Such a difference represents a valid race-neutral distinction on which Respondent's counsel based the decision on where to exercise peremptory challenges.

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[14]Ms. Hazeley immediately identified Mrs. Hicks in response to the following question asked by counsel for Petitioner: "Have you or anyone that you know ever been on the premises at the Feed Materials Production Center?" T.p. 117. Therefore, Ms. Hazeley knew immediately the identity of Mrs. Hicks and that she was connected to claims centered on the Fernald facility. Ms. Hazeley gave further evidence of potential bias when she indicated that she had seen a special on television in which Mrs. Hicks was "talking about what had happened with her husband there." T.p. 118. She stated that she had paid special attention to the show and that the show "stood out in my mind," because of her relationship with Mrs. Hicks from their work together at the University of Cincinnati Hospital. T.p. 118.

Finally, Petitioner claims that the discriminatory animus of counsel for Respondent NLO can be seen in the trial court's removal of prospective juror Virginia Elahee for cause. Petitioner outrageously claims that counsel for Respondent NLO intentionally misled the trial court in an effort to have Ms. Elahee removed from the jury. This issue has been raised below and has been rejected, including by the trial court which was in the best position to determine whether it had been misled.

Virginia Elahee indicated during voir dire that her brother had worked at the Fernald facility. T.p. 162. She stated that her brother was a pipe fitter by profession, and that she thought he was involved in "general labor" type work at the Fernald site. T.p. 166. She stated further that she had heard information concerning Fernald that "there was some leakage or something," which involved materials which were "radioactive or something like that." T.pp. 168-171. After their initial interview of Ms. Elahee, neither party sought to challenge her presence in the juror pool.

When she was questioned again by the parties, Ms. Elahee indicated that her brother had worked at the Fernald facility around 10 years ago, which would place it around 1983. T.p. 464-465. When counsel for Respondent NLO raised the issue of the relationship between Ms. Elahee and her brother who had been employed at the Fernald facility, he pointed out that his concern focused on the fact that Ms. Elahee's brother potentially was a member of a class of workers bringing suit against Respondent NLO as a result of their work at the Fernald facility. T.pp. 368-69. Counsel for Respondent NLO made it clear to the trial court that the concern over Ms. Elahee's presence in the petit jury was that, as a first-line relative, she potentially stood to be a direct beneficiary of any benefit which inured to her brother as a result of his participation in a class action suit against the Respondent in this case. T.pp. 372.

The transcript of these proceedings shows that the underlying concern expressed by counsel for Respondent NLO concerning Ms. Elahee was the potential financial benefit, and that it was against this background that Respondents' counsel raised the issue of potential financial interest, outlined in the Ohio statute dealing with juror exclusions for cause, Ohio Rev. Code § 2313.42. T.pp. 469-70. Once the court was reminded of the importance of the fact that Ms. Elahee's brother was a potential participant in a class action suit against the facility at issue in this case, the court was open to hearing further arguments from counsel on whether Ms. Elahee should be excused for cause. At no point did counsel for Respondent NLO state that Ohio Rev. Code § 2313.42 specifically and automatically excluded Ms. Elahee from the jury. [15]

Thus, the record clearly reveals that Petitioner's argument that counsel for Respondent NLO employed a "double standard" is neither plausible nor supported by the record of the proceeding below. Every one of the jurors cited in Petitioner's Brief are distinguishable from Ms. Adams based on a race-neutral characteristic. Thus, Petitioner's "double standard" argument, while imaginative, is simply absurd.

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[15] Rather, Respondent's counsel pointed out that one of the things this statutory scheme was concerned about was excluding jurors who had a potential financial interest in matters related to the case in which they were a potential juror. T.pp. 476-77. The trial court was not misled, and, quite reasonably concluded that the potential financial interest of Ms. Elahee in another case related to the Fernald facility was a sufficient justification to excuse her for cause. The court concluded that such an exclusion was "in keeping with our policy" of eliminating all possible bias from the jury in this case, particularly with sufficient members of the jury pool from which to choose. T.p. 483.

III. CONCLUSION

Pursuant to this Court's rules, review on a writ of certiorari is entirely in the discretion of the Court and is appropriate from a state court of last resort when that Court has decided an important question of federal law in a manner that is in conflict with the decisions of this Court or on a question that has not been settled by this Court. Rule 10, Rules of the United States Supreme Court. In this case, Petitioner is seeking to have this Court review a finding of fact by the trial court, not an unsettled constitutional issue or a decision of a state supreme court in conflict with the decisions of this Court. Such a review is not appropriate for review by this Court.

For these reason, and for all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 1, 1997

0435031.02

Supreme Court, U.S.
FILED
JUL 31 1997
CLERK

No. 97-34

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

DIANE HICKS,

Petitioner,

v.

WESTINGHOUSE MATERIALS COMPANY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Ohio

BRIEF OF RESPONDENTS ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, AND INDUSTRIAL COMMISSION OF OHIO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents Administrator, Bureau of Workers' Compensation, and Industrial Commission of Ohio agree for the most part with petitioner's statement of the case, as supplemented by respondent Westinghouse Materials Company.

REASONS WHY THE PETITION SHOULD BE DENIED

A. There Is No Lower Court Conflict of Authority.

As an initial matter, no lower court conflict of authority exists on the question presented. Petitioner has not shown, let alone alleged, that the lower courts have had, or are having, problems applying *Batson v. Kentucky*, 476 U.S. 79 (1986).

B. The Petition Does Not Present An Important Federal Question.

Nor, as the petition itself reveals, does this case present a novel or important federal question. It simply deals with a fact-bound application of settled law. *See Purkett v. Elem*, 514 U.S. 765 (1995). In essence all the petition complains about is the Ohio Supreme Court's factual determinations under *Batson* and *Purkett*, even though "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991). In the end the only issues in the petition are disputed issues of fact and an alleged misapplication of a settled rule of law, neither of which is an appropriate issue for this Court's discretionary review.

C. At All Events, All Three Ohio Courts Correctly Applied *Batson*.

At any rate, the lower courts correctly applied *Batson*. Counsel properly articulated a race-neutral explanation for the exclusion of Ms. Adams:

> Ms. Adams is an unemployed woman who has a very limited educational background. This is a case that involves some technical issues and medical testimony. We're concerned with the answers that we received yesterday that those issues require a certain level of education, a certain level of sophistication that may not be present in this particular juror * * * But we're making a determination based upon what we think is their ability to understand issues, watch their reactions to questions. And it's not just the questions that you ask; it's the reaction to other questions and their reactions to that * * *

T. at 577-579. Under the circumstances, it was appropriate for counsel to conclude that the education, employment background, sophistication, and demeanor of a prospective juror were important issues in a multi-week trial focused on issues related to potential radiation exposure in which ten experts would testify.

In light of the *Batson* challenge, the trial judge properly requested a race-neutral explanation from respondents, T. at 577, inquired as to the basis of that explanation as it compared with other potential jurors and jurors on the panel, T. at 579, and determined that no other jurors on the panel had less than a high school education. T.

at 581-582. The trial court's review of the juror's demeanor also was apparent during the discussion following the seating of the second alternate. T. at 589-593. Far from shirking his responsibilities under *Batson*, the trial court went beyond the explanation given by respondents and questioned whether Adams was treated any differently from other jurors. After finding that she was not, the trial judge stated that he believed that the proponent of the strike had met its burden. In fact, he gave further explanation when discussing the comparative alertness of the second alternate juror and Adams. Such considered judgment amply meets *Batson*.

In view of the trial court's ringside view of the proceedings, and the credibility-hinged nature of the inquiry, it is difficult to see why the normal discretion given to the trial court in these matters should not be respected. Since the trial court's findings are not clearly erroneous, they should not be overturned, *Hernandez v. New York*, *supra*, and need not be reviewed yet again.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should deny the petition.

Respectfully submitted,

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